91-498

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

NEW YORK CITY HOUSING AUTHORITY, HENRY BRESKY, JOHN ARAKEL, LEO LIEBERMAN, LARRY LEFKOWITZ, CYRIL GROSSMAN and RITA COSS,

Petitioners,

vs.

CATHERINE OWENS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

CATHERINE OWENS, Plaintiff-Appellant, Cross Appellee, v. NEW YORK CITY HOUSING AUTHORITY, H. BRESKY, J. ARAKEL, L. LIEBERMAN, L. LEFKOWITZ, C. GROSSMAN, and R. COSS, Defendants-Appellees, Cross Appellants

Docket No. 90-7527, 90-7541

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

934 F.2d 405

January 14, 1991, Argued
May 21, 1991, Decided

PRIOR HISTORY:

Appeal from an opinion and order of the Southern District of New York dated April 30, 1990 (Charles S. Haight, Judge), granting summary judgment to defendants on plaintiff's employment discrimination and retaliation claims under the Age Discrimination in Employment Act, 29 U.S.C. @ 621, et seq., and Title VII, 42 U.S.C. @ 2000e, et seq.

DISPOSITION: Judgment reversed and remanded; cross appeal dismissed.

COUNSEL: MARTIN F. MARVET, Cleary, Gottlieb, Steen & Hamilton, New York, New York (Richard F. Ziegler, Of Counsel), for Appellant and Cross Appellee.

HENRY SCHOENFELD, New York City Housing Authority Law Department (Manuel H. Quintana, General Counsel), for Appellee and Cross Appellant.

JUDGES: Oakes and Walker, Circuit Judges, and Wexler, District Judge.*

* Hon. Leonard D. Wexler, United States District Court for the Eastern District of New York, sitting by designation.

OPINION BY: WALKER

OPINION: [**406] Plaintiff Catherine Owens appeals from a grant of summary judgment in favor of defendants New York City Housing Authority and individual employees Arakel, Bresky, Lieberman, Lefkowitz, Grossman, and Coss (collectively, the Housing Authority), on her claims under the Age Discrimination in Employment Act, 29 U.S.C. @ 621, et seq. The district court ruled that the adverse outcome of disciplinary charges litigated in state court precluded her from proving that she was qualified for the job — an essential element on her claim of age discrimination — and that her claim of retaliation should be dismissed for lack of subject matter jurisdiction, since it had not been first filed with the Equal Employment Opportunity Commission (EEOC). Since we disagree with both rulings, we reverse and remand for further proceedings.

BACKGROUND

In January, 1977, the Housing Authority hired Catherine Owens. In 1978, Owens became a "housing assistant," responsible for maintaining records and reports and for meeting with tenants. Three years later, at the age of 51, she began working at LaGuardia Houses, a housing project managed by the Authority. In late 1981, defendant Lawrence Lefkowitz became Assistant Manager of LaGuardia Houses and, in late 1982, defendant John Arakel became Housing Manager. Lefkowitz and Arakel supervised Owens.

Owens' relationship with Lefkowitz and Arakel was strained. Owens alleges that in early 1983, Lefkowitz began to interfere [**407] with the performance of her job and verbally abused her. According to Owens, Lefkowitz told Owens that her "problems" had to do with her age and entry into menopause. Owens says that Arakel also abused her verbally and interfered with her work. She alleges that this abuse by both supervisors on occasion extended to physical pushing or shoving.

Starting in February, 1983, Owens began to complain about Arakel and Lefkowitz. She raised the issue of her supervisors' behavior in several letters to Housing Authority superiors and requested transfer to another project. She also sought the assistance of the Institute for Mediation and Conflict Resolution ("IMCR"), where she filed actions against both Arakel and Lefkowitz. Lefkowitz appeared before an IMCR mediator in April, 1983, who thereupon issued an award requiring Lefkowitz and Owens not to harass or menace each other. The IMCR action against Arakel was later transferred to criminal court, where in August, 1983, Owens received a protective order directing Arakel to stay away from her.

At the end of March, 1983, at the request of Arakel and Lefkowitz, the Housing Authority suspended Owens without pay and required her to submit to psychiatric [*4] evaluation. The test results, however, found no reason to disqualify her from her position as housing assistant. In May, 1983, at Owens' request, she was transferred to another project, Carver Houses.

Sometime during the spring of 1983, and after she had contacted the Housing Authority's internal office for equal employment opportunity, Owens took her complaints to the New York State Division of Human Rights and the EEOC. On June 27, 1983, acting pro se, she filed formal charges with the EEOC against the Housing Authority, Arakel, and Lefkowitz. On April 8, 1984, the EEOC issued Owens a right to sue letter.

In the meantime, in August, 1983, the Housing Authority filed fourteen formal disciplinary charges against Owens. Except for the first charge, which alleged that Owens had been disrespectful to another supervisor in July 1981, the charges were based on the reports of Arakel and Lefkowitz, and concerned incidents allegedly occurring during the period July 21, 1981, to March 29, 1983. Twelve of the thirteen charges alleged, among other things, that Owens had been disrespectful, insubordinate, and abusive. The thirteenth alleged that Owens had not properly performed her duties of processing tenant income reports.

Shortly after filing these disciplinary charges, the Housing Authority, through its counsel, began settlement talks with Owens, who was represented by counsel. Negotiations then broke off when, according to Owens' counsel, the Housing Authority refused to engage in plea-bargaining because Owens had filed charges with the EEOC. At no time, however, did Owens file charges with the EEOC complaining of retaliation for the Housing Authority's refusal to plea bargain.

After settlement efforts failed, a Housing Authority hearing officer conducted a full hearing, over eight days between August and December 1983, on the disciplinary charges brought against Owens. Pursuant to N.Y. Civil Service Law @ 75(2), Owens was permitted to be represented by counsel and to present and examine witnesses. On all but the last day in which she chose to represent herself, Owens was represented by counsel. Owens, Lefkowitz, Arakel, and the 1981 supervisor testified. The hearing officer found each of the fourteen charges proven, concluded that Owens' behavior was "disorderly," "disruptive," "insubordinate," and "abusive," and recommended dismissal. The Housing Authority adopted the findings and in June, 1984, terminated her employment.

Owens then commenced a proceeding in New York State Supreme Court under Article 78, N.Y. Civ. Prac. L. & R., to review the administrative decision. In a decision dated February 25, 1985, the Article 78 court upheld the hearing officer's finding of "gross insubordination."

In July, 1984, shortly after she received her right-to-sue letter from the EEOC, but before her discharge had been affirmed by the Article 78 court, Owens commenced the [**408] instant action. She claims that (1) her termination was the result of age discrimination or, alternately, was in retaliation for letters to superiors complaining of age discrimination, all in violation of the ADEA; and (2) after she filed charges with the EEOC on her age claim and wrote letters to her superiors claiming race as well as age discrimination, the Housing Authority retaliated,

in violation of the ADEA and Title VII, by refusing to plea-bargain her disciplinary charges.[1]

In October, 1985, the Housing Authority unsuccessfully moved for summary judgment. The district court rejected the Housing Authority's argument that no genuine issue of fact existed as to Owens' qualifications. The district court also found that by presenting direct evidence of discrimination, Owens had raised a triable issue as to whether defendants' allegations of insubordination and incompetence were pretextual. The district court relied primarily on Lefkowitz's reported comment concerning Owens' age and entry into menopause, noting that the comments were "direct evidence" of Owens' supervisor's state of mind. The district court also rejected the Housing Authority's argument that res judicata precluded Owens' federal claims, because the Article 78 reviewing court could not have considered an age discrimination claim brought by Owens.

The district judge later granted permission to the Housing Authority to move for summary judgment a second time. The district judge granted this second motion. He ruled that the state court proceedings which affirmed the Housing Authority's guilty findings on the disciplinary charges precluded her from litigating

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[1] ADEA provides:

It shall be unlawful for an employer to discriminate against any of his employees . . . because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or . . . made a charge, testified, assisted or participated in any manner in an investigation, proceeding, or litigation under this chapter.

29 U.S.C. @ 623(d). Title VII provides:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. @ 2000e-3(a).

the issue of her qualification for the job, and thus from establishing a prima facie case of age discrimination. The district judge also dismissed plaintiff's claim of retaliation arising out of the Housing Authority's refusal to plea bargain, on the grounds that subject matter jurisdiction was lacking since the retaliation claim was not the subject of a prior complaint to the EEOC.

Owens appeals both rulings. A cross-appeal by the Housing Authority was not pressed and is deemed abandoned.

DISCUSSION

We review the district court's grant of summary judgment de novo, applying the same standard as the district court. We must determine whether "a genuine issue as to any material fact exists and if the moving party is entitled to judgment on the merits." Taggart v. Time, Inc., 924 F.2d 43, 45-46 (2d Cir. 1990). In deciding a summary judgment motion, "it is not the trial court's function to weigh the evidence and resolve the factual issues; rather, its role on such a motion is to determine as a threshold matter whether there are genuine unresolved issues of material fact to be tried." Gibson v. American Broadcasting Cos., 892 F.2d 1128, 1132 (2d Cir. 1989). On appeal, all doubts in the factual record must be resolved in favor of the non-movant. Taggart, 924 F.2d at 45-46.

A. The Age Discrimination Claim

We turn first to the district court's decision that the state court finding of misconduct collaterally estopped Owens from presenting a prima facie case of age discrimination under the test set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). McDonnell Douglas, which applies to ADEA actions, see Montana v. First Fed. Savings & Loan Ass'n [**409] of Rochester, 869 F.2d 100, 103 (2d Cir. 1989), requires a plaintiff alleging discriminatory termination to show (1) that she is within the protected class; (2) that she is qualified for the position; (3) that she has been terminated; and (4) that a younger individual

has replaced her. Id. Once the prima facie showing is made, the employer bears the burden of demonstrating legitimate nondiscriminatory reasons for the discharge. If the employer is able to demonstrate such reasons, the burden again shifts to the employee to show that the articulated reason is pretextual. See also Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981).

Owens does not here dispute the state court findings of misconduct. She does argue, however, that the finding should not be held to preclude her from proving the second element of a prima facie claim under McDonnell Douglas – that she is qualified for the position of housing assistant. We agree.

In order to apply the doctrine of collateral estoppel or issue preclusion, there must be an identity of issue between the prior action and the present action. The issue must actually have been resolved in the prior action, and resolution of the issue must have been necessary. Further, there must have been "a full and fair opportunity to contest the decision said to be controlling." Schwartz v. Public Adm'r, 24 N.Y.2d 65, 71, 298 N.Y.S.2d 955, 960, 246 N.E.2d 725, 729 (1969); see also D'Arata v. New York Central Mutual Ins., 76 N.Y.2d 659, 665-66, 563 N.Y.S.2d 24, 28, 564 N.E.2d 634, 638 (1990).

Here, while the state court issue – misconduct – was necessarily resolved after a full and fair opportunity to contest it, the issue was not the same as the one said to be precluded – job qualification. McDonnell Douglas requires only a minimal showing of qualification to establish a prima facie claim. Owens only needs to demonstrate that she "possesses the basic skills necessary for performance of [the] job." Powell v. Syracuse Univ., 580 F.2d 1150, 1155 (2d Cir.), cert. denied, 439 U.S. 984 (1978).

The state court never passed on Owens' competence to perform her work. Rather, it upheld the Trial Officer's findings of

misconduct and "gross insubordination."[2] We have no doubt that such misconduct may certainly provide a legitimate and non-discriminatory reason to terminate an employee. This misconduct is distinct, however, from the issue of minimal qualification to perform a job. An individual may well have the ability to perform job duties, even if her conduct on the job is inappropriate or offensive. Accordingly, the finding of misconduct here cannot preclude Owens from showing her qualification for employment as required by McDonnell Douglas.

We note that in the first opinion denying summary judgment, the district court ruled that by presenting evidence of "competence," Owens had succeeded in raising a genuine issue as to her qualification for the job. The district court denied summary judgment to defendants on that basis. The conclusion was based on evaluations of Owens' work by individuals other than Arakel and Lefkowitz, whose relationship with Owens was admittedly poor.

Owens should not have been precluded by the state court finding of misconduct from litigating her qualification to perform her job.

Since we are remanding on the issue of job qualification, there is no need to address Owens' further argument that she has produced sufficient direct evidence of discrimination to entitle her to bypass the requirements of McDonnell Douglas altogether, and to show simply that an "illegitimate factor played a motivating or substantial role" in her firing. See Grant v. Hazelett Strip-Casting, 880 F.2d 1564, 1568 (2d Cir. 1989).

The Housing Authority further contends that even if the state misconduct findings do not negative job qualification, they

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[2] The fact that one of the fourteen disciplinary charges concerned "incompetence" does not change our conclusion. The finding of incompetence was clearly not necessary to the trial officer's conclusion that discharge was an appropriate sanction. The finding is thus without preclusive effect. Moreover, the Article 78 court did not mention that charge. Rather, it upheld the discharge as justified by "gross insubordination."

demonstrate that Owens' discharge was based on legitimate [*13] non-discriminatory grounds and that summary judgment should have been granted on that basis. The problem with this argument, however, is that the district court found that Owens had presented sufficient direct evidence of age discrimination based on comments by Arakel and Lefkowitz to withstand summary judgment. The Housing Authority's rejoinder that the evidence of these comments is uncorroborated and not credible is a jury argument inappropriate on a motion for summary judgment where every reasonable inference is to be drawn in favor of the non-movant.

Only if no reasonable trier of fact could find in favor of the non-moving party should summary judgment be granted. Taggart, 924 F.2d at 46. Here the district court correctly found that the reported comments of Arakel and Lefkowitz relating to Owens' age raised a triable issue as to whether the articulated reasons for her firing were pretextual. While the statements presented were not numerous, they were made by individuals with substantial influence over Owens' employment. Arakel and Lefkowitz supervised Owens and were responsible for the vast majority of the disciplinary charges brought against her. Drawing all factual inferences in favor of Owens, as we must, we agree that the comments of Arakel and Lefkowitz raise a genuine issue of fact on the issue of pretextuality.

Lastly, the Housing Authority argues in support of the judgment below that Owens' claims are barred by the doctrine of res judicata, since the Article 78 review proceeding provided Owens with a full and fair opportunity to raise her retaliation and discrimination claims. The Housing Authority is plainly wrong.

Under New York law, the Article 78 proceeding was limited to the issues of whether the administrative determination was made in violation of lawful procedure, was arbitrary or capricious or an abuse of discretion, or was not supported by substantial evidence. N.Y. Civ. Prac. L. & R. @ 7803(3) and (4). The Article 78 reviewing court was not empowered to address

Owens' claims of discrimination or retaliation. Owens' claims are not barred by the doctrine of res judicata.

B. Subject Matter Jurisdiction over the Retaliation Claim

The district court found that subject matter jurisdiction did not exist over Owens' claim that the Housing Authority had retaliated against her by refusing to plea bargain her disciplinary charges. The district court reasoned first that since the charges had not been filed with the EEOC before being presented to the district court, and were not otherwise "reasonably related" to the allegations in the complaint that was filed with the EEOC, it could not hear the retaliation claim under 29 U.S.C. @ 626(d).[3] See Almendral v. New York State Office of Mental Health, 743 F.2d 963, 967 (2d Cir. 1984).

It is undisputed that this claim of retaliation arises out of incidents subsequent to the filing of the EEOC complaint. Our prior rulings make clear, however, that her retaliation claim must nonetheless be considered "reasonably related" to the complaint she filed with the EEOC.

We have previously held that when an employee brings a claim alleging retaliation [**411] for filing a complaint with the EEOC, the retaliation claim is deemed "reasonably related" to the original EEOC filing. In such a case, the allegations of retaliation are seen as stemming from the earlier discriminatory incident, including plaintiff's attempt to vindicate her federal

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[3] The Housing Authority does not contend that Owens needed to file a separate complaint with the EEOC covering her contention that the Housing Authority pressed disciplinary charges resulting in discharge in retaliation for her in-house complaints about her supervisors. The argument is based on essentially the same factual allegations presented in the age discrimination complaint that was filed with the EEOC. It simply offers a different theory for the adverse personnel action. The complaint Owens filed with the EEOC gave the New York City Housing Authority adequate notice of her allegations and opportunity for conciliation. Cf. Snell v. Suffolk Cty., 782 F.2d 1094, 1101 (2d Cir. 1986); Almendral v. New York State Office of Mental Health, 743 F.2d 963, 967 (2d Cir. 1984).

rights against discrimination. The retaliation claim may thus be heard notwithstanding plaintiff's failure to state it in a separate complaint filed with the EEOC.

In Goodman v. Heublein, Inc., 645 F.2d 127 (2d Cir. 1981), we held that plaintiff's claim that he was transferred out of the country in retaliation for his EEOC complaint alleging age discrimination in the failure to promote him was "reasonably related" to the complaint. See also Kirkland v. Buffalo Board of Education, 622 F.2d 1066 (2d Cir. 1980) (per curiam).

We note that Halpert v. Wertheim & Co., Inc., 81 F.R.D. 734 (S.D.N.Y. 1979), on which the district court relied, was decided prior to our adoption of the "reasonable relationship" test in Kirkland, supra. Miller v. International Tel. & Tel. Co., 755 F.2d 20 (2d Cir.), cert. denied, 474 U.S. 851 (1985), also relied upon by the district court, is inapposite. Miller holds only that a failure to rehire claim is not "reasonably related" to a claim based on an earlier dismissal. Miller in no way alters the rule set forth in Goodman and Kirkland that a claim alleging retaliation for an employee's filing of charges with the EEOC is reasonably related to that complaint.

Owens alleges that the Housing Authority retaliated against her for filing with the EEOC by refusing to plea bargain her disciplinary charges. Since her claim is reasonably related to her EEOC filing, the district court should have found subject matter jurisdiction over the retaliation claim.

On appeal, the Housing Authority does not press the argument that the claim is not reasonably related to the EEOC complaint; [*18] rather, it argues that a failure to plea bargain does not constitute an "adverse employment action," within the meaning of the ADEA. See, e.g., Grant v. Bethlehem Steel, 622 F.2d 43, 46 (2d Cir. 1989) (Title VII) ("an employment action or actions disadvantaging persons engaged in protected activities"). Whether this is so, however, should be decided in the first instance by the district court, upon an appropriate motion following remand.

In sum, Owens is not precluded by the state court ruling on misconduct from proving her qualification for her job on her ADEA claim, and the district court should have exercised subject matter jurisdiction over Owens' claim of retaliation. We therefore vacate the district court's grant of summary judgment, dismiss the cross appeal, and remand for further proceedings not inconsistent herewith.

CATHERINE OWENS, Plaintiff, v. NEW YORK CITY HOUSING AUTHORITY, H. BRESKY, J. ARAKEL, L. LIEBERMAN, L. LEFKOWITZ, C. GROSSMAN, and R. COSS, Defendants

No. 84 Civ. 4932 (CSH)

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

April 23, 1990, Decided and Filed

OPINION BY:

HAIGHT, JR.

OPINION: MEMORANDUM OPINION AND ORDER

CHARLES S. HAIGHT, JR., UNITED STATES DISTRICT JUDGE

In obedience to the Court's prior orders, the parties have engaged in further discovery. Plaintiff now moves to compel the production of additional documents. Defendants oppose that motion and cross-move for summary judgment. This is defendants' second summary judgment motion.

The factual background of this case is recited at length in the Court's prior opinions, with which familiarity is assumed. In brief, plaintiff's claims against defendants are for retaliation under Section 704(a) of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. @ 2000e-3(a), and Section 4(d) of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. @ 623(d), and for age discrimination under the ADEA. Plaintiff's claims arise out of the disciplinary charges and disciplinary proceeding brought against her while she was employed as a Housing Assistant at defendant New York City Housing Authority's LaGuardia Houses. The individual defendants were involved in one way or another with plaintiff during her employment

with the Housing Authority. The disciplinary proceeding resulted in plaintiff's termination from her job with the Housing Authority on June 8, 1984. Plaintiff claims that the disciplinary charges and proceedings resulting in her termination were brought against her on the basis of her age and in retaliation for actions she had taken which were protected under Title VII or ADEA.

The ADEA Claim

Plaintiff would make out a prima facie case of an ADEA violation by establishing that she was (1) a member of the protected class, (2) qualified for her job, (3) fired, and (4) replaced by a younger individual. Discharge under those particular circumstances gives rise to a rebuttable inference of discrimination on account of age. Benjamin v. United Merchants and Manufacturers Inc., 873 F.2d 41, 42 (2d Cir. 1989); Bonura v. Chase Manhattan Bank, N.A., 795 F.2d 276, 277 (2d Cir. 1986); Haskell v. Kaman Corp., 743 F.2d 113, 119 n.1 (2d Cir. 1984). Summary judgment for a defendant is appropriate if after discovery it appears that the plaintiff cannot show any one of the four elements of a prima facie case. That is because, absent such proof, no inference of age discrimination arises and there is nothing for defendant to rebut.

In the case at bar, defendants contend that no genuine issue as to any material fact exists with respect to the second element, plaintiff Owens' qualification for her job of Housing Assistant, and the fourth element, her replacement by a younger individual, so that Rule 56(c), F.R.Civ.P., entitles defendants to summary judgment on the age discrimination claim.

Defendants are clearly correct with respect to the second element. In August 1983 plaintiff was formally charged by the Housing Authority with thirteen separate violations and twenty-seven separate specifications involving misconduct and incompetency allegedly occurring during the period July 21, 1981 to March 29, 1983. The sustaining of such charges or any significant portion of them would by definition demonstrate that plaintiff was not qualified for her job. Because plaintiff had previously

completed a probationary period, she had achieved civil service tenure and was entitled to the procedures specified in @ 75(2) of the N.Y. Civil Service Law, whose provisions appear in the margin. n1 Jonathan E. Raines, a Trial Officer appointed by the Housing Authority, conducted hearings on eight separate days between August 3 and December 20, 1983. He heard the testimony of a number of Housing Authority witnesses, the testimony of the plaintiff, and examined various exhibits. He found plaintiff guilty of substantially all of the charges and specifications and recommended dismissal. The Trial Officer's written report concluded:

It is the finding and opinion of the undersigned, that the respondent [plaintiff] engaged in disorderly and disruptive behavior when assigned to the LaGuardia Houses and was insubordinate, disrespectful, threatening, and abusive to her supervisors, to the extent that the day to day operation of LaGuardia Houses were adversely affected. . . . The respondent's bad temper, abusive and threatening language, and do as I please attitude, if permitted to go unchecked, will cause irreparable harm and damage for the authority, its employees and tenants. Therefore, it is the recommendation of the undersigned, that the respondent be dismissed as a housing assistant, as a just and proper sanction for being found guilty of the herein serious charges.

n1 N.Y. Civil Service Law @ 75(2) provides:

Procedure. A person against whom removal or other disciplinary action is proposed shall have written notice thereof and of the reasons there for, shall be furnished a copy of the charges preferred against him and shall be allowed at least eight days for answering the same in writing. The hearing upon such charges shall be held by the officer or body having the power to remove the person against whom such charges are preferred, or by a deputy or other person designated by such officer or body in writing for that purpose. In case a deputy or other perons is so designated, he shall, for the purpose of such hearing, be vested with all the powers of such officer or body and shall make a record of such hearing which shall, with his

recommendations, be referred to such officer or body for review and decision. The person or persons holding such hearing shall, upon the request of the person against whom charges are preferred, permit him to be represented by counsel, or by a represenative of a recognized or certified employee organization, and shall allow him to summon witnesses in his behalf. The burden of proving incompetency or misconduct shall be upon the person alleging the same. Compliance with technical rules of evidence shall not be required.

The Housing Authority accepted that recommendation and terminated plaintiff's employment. Plaintiff thereafter applied to the New York State Supreme Court, New York County pursuant to N.Y.CPLR Article 78 for a judgment annulling that dismissal. She alleged primarily that the Trial Officer violated lawful procedure and that the penalty imposed was excessive. The State Court (Ira Gammerman, J.) denied plaintiff's application and dismissed her petition, concluding in a memorandum opinion dated February 25, 1985: Petitioner was found guilty of gross insubordination to three supervisors covering a twenty month period despite numerous warnings and attempts at counselling. The gravity of her offense and the hearing officer's finding of guilt are supported by overwhelming evidence which is not challenged here. The penalty, which was properly imposed subsequent to the findings of guilt, cannot be said to be disproportionate so as to shock one's sense of fairness.

Plaintiff took no appeal from that decision.

Plaintiff is precluded from relitigating in this federal court an issue essential to her age discrimination claim. Bray v. New York Life Insurance, 851 F.2d 60 (2d Cir. 1988), applies a fortiori and is dispositive. In Bray plaintiff sought to assert a Title VII discrimination case in federal court after an unfavorable determination by the New York State Division of Human Rights and an application pursuant to CPLR Article 78 to the New York State Supreme Court for judicial review. The state court dismissed the Article 78 petition because the employee was one day late in filing it. The Second Circuit held that the federal

court must give preclusive effect to the state court judgment and that the federal claim was barred. Even as to a Title VII claim brought in the federal court, "state law determines at least the issue preclusive effect of a prior state judgment in a subsequent action involving a claim within the exclusive jurisdiction of the federal courts." Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373, 381 (1985). Because New York law considers a dismissal on statute of limitations ground sufficient to bar a second action, the Second Circuit held in Bray that plaintiff "is precluded from relitigating her claims of race and sex discrimination in federal court." Id. at 63. Judge Pratt added:

Unfortunately for Bray, "[t]he crucial factor is that [she] chose to submit her case to the state courts for review". Sinicropi v. Nassau Cty., 601 F.2d 60, 62 (2d Cir.) (emphasis in original) (per curiam), cert. denied, 444 U.S. 983, 100 S.Ct. 488, 62 L.Ed.2d 411 (1979). . . . Once a plaintiff has entered the state court system, she is bound by the preclusion rules governing that system, and the federal courts in turn must respect the finality of the judgments that issue from the state court. Id. at 64.

Bray controls the case at bar a fortiori because here the state court considered the merits of plaintiff's petition to review the agency action, rather than dismissing the petition as time barred.

The rule in such cases derives from 28 U.S.C. @ 1738, which bestows upon state court judicial proceedings "the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . ." see also Kremer v. Chemical Construction Corp., 456 U.S. 461 (1982) (Title VII claim in federal court precluded by state court decision affirming state agency's rejection of discrimination claim); cf University of Tennessee v. Elliott, 478 U.S. 788 (1986) (no preclusive effect in Title VII claim where following adverse decision from state administrative agency plaintiff did not seek judicial review in the state system).

Defendants are entitled to summary judgment dismissing plaintiff's ADEA claim for age discrimination. n2

n2 In these circumstance, I need not consider defendants' additional contention that plaintiff could not succeed on the fourth element of her ADEA claim, replacement by a younger person. Defendants support that contention on this motion by an affidavit of a Housing Authority witness tending to show that plaintiff was replaced by a woman of comparable age. But the Authority had acknowledged in earlier sworn answers to interrogatories that younger individuals replaced plaintiff. Defendant now says those answers were mistaken. I would not preclude defendant from seeking to correct an error, but plaintiff would be entitled to further discovery on the issue if it were decisive. However, it is not. All four elements of a prima facie ADEA claim must appear to require a defendant to go forward, and plaintiff at bar cannot prove the second element.

Retaliation Claim

Plaintiff's retaliation claims are summarized in her brief in opposition to the present motion for summary judgment at 8:

In retaliation for Owens' protective [sic; should read protected] actions, the Housing Authority filed disciplinary charges alleging insubordination and misconduct against Owens. In addition, the Housing Authority refused to plea bargain the charges brought against Owens, in retaliation of her having filed a complaint with the EEOC.

As noted supra, the retaliation claims are asserted under both Title VII, 42 U.S.C. @ 2000e-3(a), and the ADEA, 29 U.S.C. @ 623(d).

In order for the district court to have subject matter jurisdiction over a charge asserted under either statute, that charge must first have been filed with the EEOC. O'Malley v. GTE Service Corp., 758 F.2d 818 (2d Cir. 1985) (ADEA); Almendral v. New York State Office of Mental Health, 743 F.2d 963 (2d Cir. 1984) (Title VII).

By letter dated June 14, 1983, the Housing Authority placed plaintiff on notice of charges against her for alleged incompetency and misconduct. These are the charges and specifications which eventually formed the subject matter of the hearings before Trial Officer Raines discussed supra.

On June 27, 1983 plaintiff filed charges with the EEOC. The EEOC complaint charged plaintiff's superiors with harassment and with the bringing of charges against her seeking her dismissal, those being the charges specified in the Housing Authority's June 14, 1983 letter. Plaintiff's EEOC complaint charged discrimination on the basis of her sex (female), religion (Christian), age (53), and race (black). By certified letter dated April 9, 1984 the EEOC issued its "determination as to the merits" of plaintiff's charges. The EEOC referred to the charges of discrimination by harassment due to race, sex, religion and age, and notified plaintiff that the EEOC had concluded its processing of both the Title VII and ADEA allegations of the complaint. A notice of right to sue was sent to the plaintiff, and she was advised of her statutory rights to commence litigation in the federal district court.

Plaintiff's June 1983 EEOC complaint contained no charge of retaliation. Plaintiff first asserted specific claims of retaliation in 1985 in papers opposing defendants' first motion for summary judgment. Specifically, plaintiff alleged that in August 1983 the Housing Authority's disciplinary hearing attorney stated that he had refused to consider "plea-bargaining" the disciplinary charges then being heard by Trial Officer Raines because plaintiff had filed a charge with the EEOC. Plaintiff also asserted for the first time in November 1985 the possibility that the disciplinary charges had been preferred against her in June 1983 because she had previously complained about her supervisors to the Housing Authority's in house Office of Equal opportunity.

Defendants argue that they are entitled to summary judgment on plaintiff's retaliation claim because that charge was not first filed with the EEOC, thus depriving this Court of subject matter jurisdiction. I agree.

A retaliatory conduct charge may not be considered by the district court unless it was separately submitted to the EEOC unless, even absent such separate submission, "such claim is found to be of a continuing nature, or related to the original charges", Halpert v. Wertheim & Co., 81 F.R.D. 734, 735 (S.D.N.Y.) (Sweet, J.).

In Kirkland v. Buffalo Board of Education, 622 F.2d 1066, 1068 (2d Cir. 1980), a case upon which both parties at bar rely, the Second Circuit dealt with the concept of a "reasonably related" claim:

The issuance of a "right to sue" letter, although not constituting an open license to litigate any claim of discrimination against an employer, does permit a court to consider claims of discrimination reasonably related to the allegations in the complaint field with the EEOC, "including new acts occurring during the pendency of the charge before the EEOC." Oubichon v. North American Rockewll Corp., 482 F.2d 569, 571 (9th Cir. 1973).

Whether a subsequently asserted claim of discrimination is reasonably related to charges in an EEOC complaint depends upon the particular facts and circumstances. In Kirkland, plaintiff's EEOC complaint alleged that defendant had refused to hire him in 1973 because of his race. The EEOC issued plaintiff a "right to sue" letter in May 1977. Shortly before issuance of that authorization, the position in question again became available. Plaintiff again applied, and was again rejected. His Title VII suit in the district court claimed violations in refusing to hire him both in July 1973 and in May 1977. The Second Circuit held that even though the 1977 refusal to hire was not included in the plaintiff's EEOC complaint, he was not required to file a second EEOC complaint and obtain a second authorization to sue. The court of appeals rejected the employer's theory that a person claiming that he was wrong fully and repeatedly denied employment must obtain a separate "right to sue" letter for each incident, regardless for any interrelationships between the separate denials. 622 F.2d at 1068.

The court, after stating the general rule quoted above, observed: Appellee Kirkland alleges, and the district court found, that the decision to deny Kirkland employment in May 1977 was in retaliation for Kirkland's initiation of litigation regarding the July 1973 refusal to hire him. Thus, the two claims of discrimination were directly related. Ibid.

In Almendral v. New York State Office of Mental Health, supra, the Second Circuit cited Kirkland and held that claims asserted in the district court were reasonably related to the EEOC charges in the following circumstances:

In the instant case, defendants' alleged subsequent acts are essentially the same as the earlier allegedly wrongful conduct contained in the EEOC complaint: namely, alleged manipulation of the civil service rules for discriminatory reasons in order to appoint someone other than Almendral. 743 F.2d at 967.

The factual circumstances in Kirkland and Almendral may be contrasted with Miller v. International Telephone and Telegraph Corporation, 755 F.2d 20 (2d Cir. 1985). Plaintiff's EEOC complaint charged his employer with age discrimination in discharging him in April 1979. Plaintiff had not made a timely filing with the EEOC, but attempted to meet that problem by contending in the district court that his employer engaged "in a continuing violation as to him by the refusal of its subsidiaries to rehire him at a point within the statutory period," one such application having been made in 1980, within 300 days of the date he filed his claim with the EEOC. 755 F.2d at 25. The Second Circuit rejected that contention:

because no such claim of failure to rehire was made in Miller's EEOC complaint. . . . Absent the filing of such a claim with the EEOC it could not become the basis of the present action. . . . There would be no reason for the EEOC to investigate the failure to rehire in connection with the claim of alleged discriminatory discharge unless the former were asserted as part of that claim, which it was not. The purpose of the notice provision, which is to encourage settlement of discrimination

disputes through conciliation and voluntary compliance, would be defeated if a complainant could litigate a claim not previously presented to and investigated by the EEOC.

Id. at 25-26.

In the course of its discussion the court of appeals cited cases for the propositions that a "charge of illegal layoff does not encompass failure to rehire", and "a refusal to reinstate is separate claim from dismissal." Id. at 25.

In Halpert v. Wertheim & Co., Inc., supra, the plaintiff's EEOC complaint charged the employer with terminating her employment because of her sex on August 5, 1977. She reiterated that charge in her Title VII action in the district court, but sought to amend her complaint to add a claim alleging retaliatory conduct by the employer, taking the form of an attempt to arbitrate her claim. Judge Sweet refused the amendment because the retaliatory conduct alleged did not relate to the original charge filed with the EEOC. He wrote at 81 F.R.D. 735:

Although the retaliatory conduct may continue to date, it was not of a continuing nature vis a vis the original allegations filed with the EEOC. The retaliatory conduct here alleged is completely separate and distinct from the conduct originally complained of—discrimination based upon sex as opposed to retaliatory conduct in seeking arbitration of the dispute; in fact, relief is sought under different statutory provisions. Therefore, there has been no tolling of the time period in which to file with the EEOC.

Turning to the case at bar, it is apparent that plaintiff's claims of retaliatory conduct asserted in this litigation were not presented to the EEOC for investigation and conciliation, and are not reasonably related to the claims that were so presented. Plaintiff's claim that in August 1983 the Housing Authority's attorney refused to consider plea-bargaining the disciplinary charges in retaliation for the EEOC filing is closely analogous

to the retaliatory conduct alleged in Halpert, and is as separate and distinct from the discriminatory conduct originally complained of as was the conduct in that case. Plaintiff's second suggestion of retaliatory conduct is that her earlier complaint to the Housing Authority's in-house office of Equal Opportunity may have caused retaliatory disciplinary charges to be preferred against her in June 1983. Plaintiff was on notice of those disciplinary charges at least ten days before filing her EEOC complaint, which as noted refers specifically to the disciplinary proceeding. That claim of retaliatory conduct could have been included in the EEOC complaint, but it was not, and is not reasonably related to the charges of discrimination which plaintiff did assert.

Plaintiff argues in her brief at 31 that her letter to the EEOC of March 14, 1984 "enunciated her retaliation claim and thereby provided the EEOC with the requisite notice." I have considered that letter but cannot accept counsel's characterization. The word "retaliation" appears in the fourth paragraph of the letter, but the context has to do with plaintiff's requests to be transferred from the Wagner Houses project to another project operated by the Housing Authority. Plaintiff wrote to the EEOC in part:

Even after I moved to Staten Island and car fare was $ 4.50 per day ($ 22.50 per week), I was still not allowed to transfer and was there [at Wagner Houses] for almost three years. As retaliation for my requests for transfers I was written up. This is clearly not the sort of retaliatory conduct which plaintiff now seeks to allege in this litigation. Indeed, retaliation because of a request for transfer, even assuming it occurred, would not constitute retaliation because of conduct protected by either statute.

The able briefs of counsel address other issues. In the view I take of the case I need not deal with them, except to say that there is nothing in the procedural history of the case or in the record constituting a waiver by defendants of the contentions upon which summary judgment in their favor is now granted, or estopping them from making those contentions.

Conclusion

For the foregoing reasons, defendants' motion for summary judgment is granted. The Clerk of the Court is directed to dismiss the complaint in its entirety with prejudice and without costs.

I deny plaintiff's motion to compel additional discovery. There is nothing in the material sought to be discovered which would alter the foregoing analysis.

It would not be right to conclude this opinion without expressing the Court's appreciation to the firm of Cleary, Gottlieb, Steen & Hamiliton and to the attorneys associated with that firm who have represented plaintiff at the Court's request as a form of public service. That the facts and circumstances seem to me at least to require judgment in defendants' favor is surely no reflection upon the energy, skill and dedication which plaintiff's counsel have demonstrated throughout the litigation. Their service has been in the highest tradition of the Bar, and I express to them and to their firm the gratitude of the Court.

Dated: New York, New York
April 23, 1990

Catherine Owens, Plaintiff, v. New York City Housing Authority, H. Bresky, J. Arakel, L. Lieberman, L. Lefkowitz, C. Grossman and Rita Coss, Defendant

84 Civ. 4932 (CSH)

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

1987 U.S. Dist. LEXIS 6891

July 30, 1987, Decided; July 31, 1987, Filed

OPINION BY:

HAIGHT

OPINION: MEMORANDUM OPINION AND ORDER

HAIGHT, District Judge:

On June 8, 1984, after an administrative hearing, plaintiff Catherine Owens was terminated from her job as a Housing Assistant with the New York City Housing Authority. In this action she alleges that her termination and certain other adverse employment actions were unlawfully motivated by her age, sex, religion and race and constitutes unlawful retaliation for having opposed discriminatory practices and filed charges with the EEOC. Owens has now abandoned the religion, sex, and race claims. Accordingly the claims for age discrimination and retaliatory discharge remain. Defendants move for summary judgment on two alternative grounds: the absence of a genuine issue of material fact on these claims, and res judicata.

Owens was hired by the Housing Authority as a typist January 31, 1977. After passing a civil service examination, she became a Housing Assistant on July 31, 1978, responsible for maintaining records and reports and conducting daily meetings with tenants. Owen Aff. para. 2. She began working at "LaGuardia Houses" in August 1981.

In October 1981, Lawrence M. Lefkowitz became Assistant Manager of LaGuardia Houses, and in December 1982, John S. Arakel became Housing Manager. Owens' relationships with Lefkowitz and Arakel soon soured. In September, 1982, Owens complained to her union representative about Lefkowitz. In February 1983, she says, Lefkowitz began interfering with the performance of her job and "began to verbally abuse me and suggested that my alleged 'problems' had to do with my age and entering menopause." Owens Aff. para. 6. Around the same time, she asserts, Arakel also began verbally abusing her and interfering with her work. Owens Aff. para. 7. There were pushing and shoving incidents with both Arakel and Lefkowitz. para. 8.

Beginning in March, 1983, Owens wrote a number of letters to Housing Authority superiors complaining of her supervisors' "harassing behavior" and seeking a transfer to another housing project. paras. 9, 12. After being suspended without pay by Arakel and Lefkowitz from March 28, 1983 through May 6, 1983 for psychiatric evaluation — an evaluation that found no reason to disqualify her from employment — she was transferred on May 9, 1983 to another project, Carver Houses.

Meanwhile, Owens had sought the assistance of the Institute for Mediation and Conflict Resolution, Inc. ("IMCR"). On April 7, 1983, IMCR issued an arbitration "award" directing Lefkowitz and Owens to leave each other alone. Her case against Arakel was transferred to Criminal Court, New York County which on August 18. 1983 issued a protective order directing Arakel to "stay away from the home, school, business or place of employment of Catherine Owens." para. 10; Ex. B to Owen Aff.

In February or March, 1983, Owens also contacted the Housing Authority's internal office for equal employment opportunity. When in June 1983 no action had been taken by that office, she contacted the New York State Division of Human Rights ("NYDHR") and the Equal Employment Opportunity Commission ("EEOC"), and on June 27, 1983, she filed charges with the EEOC against the Housing Authority, Arakel and Lefkowitz. The EEOC found no probable cause, and issued her right to sue letter April 8, 1984.

Defendants contend that these problems were caused by Owens' poor attitude and performance. They rely on the thirteen disciplinary charges filed against Owens on June 14, 1983. Those charges cite numerous instances of insubordination and incompetence. The first charge concerned alleged misconduct July 21, 1981, before Lefkowitz and Arakel became her supervisors. The remainder were during their administration.

A Housing Authority hearing officer conducted an eight-day administrative hearing with the disciplinary charges filed against Owens. Owens, Lefkowitz, Arakel, and Owens' July 1981 supervisor all testified. Owens was represented by counsel for all but the last day. n1 The hearing officer disbelieved Owens on virtually every issue on which there was a factual dispute, found her guilty of most of the charges and recommended that Owens be terminated. The Housing authority confirmed his findings and adopted his recommendation, and Owens was terminated June 8, 1984. Owens then commenced a proceeding under Article 78, N.Y. Civ. Prac. L. & R., challenging her discharge. The action was resolved against her February 25, 1985.

n1 Owens chose to represent herself the eighth day of the hearing.

I. The Existence of a Genuine Issue of Fact

A. Retaliation

Section 704(a) of Title VII of the Civil Rights Act of 1964 ("Title VII") provides, in pertinent part:

It shall be an unlawful employment practice for an employer to discriminate against [an employee] . . . because [the employee] has opposed any practice made an unlawful employment practice by this subchapter, or because [the employee] has made a charge . . . or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. @ 2000e-3(a). Substantially identical language appears in section 4 of the Age Discrimination in Employment Act

("ADEA"), 29 U.S.C. @ 623(d). The protection of these provisions does not depend on the validity of the underlying charges. Sias v. City Demonstration Agency, 588 F.2d 692, 695 (9th Cir. 1978); Sims v. Mme. Paulette Dry Cleaners, 580 F. Supp. 593, 594 (S.D.N.Y. 1984).

To make out a prima facie case of retaliation, plaintiff must show (1) protected participation or opposition under Title VII or the ADEA; (2) an adverse employment action or actions against her; and (3) "a causal connection between the two elements, that is, a retaliatory motive playing a part in the adverse employment actions." Grant v. Bethlehem Steel Corp., 622 F.2d 43, 46 (2d Cir. 1980). The causal connection may be established circumstantially by showing that the adverse action followed protected opposition or participation. Ibid. The question is whether the employer took an adverse action against the employee "at least in part" because of protected activity. Sim, supra, 580 F. Supp. at 596.

There is no dispute that Owens engaged in protected "opposition" and "participation." Owens complained of discriminatory treatment by superiors in February or March, 1983 to the Housing Authority's internal office for equal employment opportunity. In June, 1983, she contacted the New York State Division of Human Rights and the EEOC, and she filed charges with the EEOC on June 27, 1983.

There is also no dispute that at least one adverse employment action was taken against Owens: she was dismissed. n2

n2 Defendants do not concede that Owens was also harassed.

Defendants contend, however, that there is no genuine issue of fact on the third element: causation. They note that the Housing Authority filed its disciplinary charges against Owens June 14, 1983, almost two weeks before Owens filed her charges with the EEOC.

This chronology is not dispositive. First, Owens did complaint to the Housing Authority's internal equal employment

opportunity office before charges were preferred against her. Moreover, Owens offers direct evidence that the Housing Authority decided not to offer her a plea bargain because she filed charges with the EEOC. Michael Shen, who represented Owens at the disciplinary hearing, swears that he met with Housing Authority attorney Jerome Weisberger in August, 1983 to discuss a plea bargain that presumably would have preserved Owens' job. At a second meeting later that month, however, Weisberger "stated that because Owens had filed charges with the [EEOC] against the Housing Authority, plea bargaining was no longer a possibility." Shen Aff. para. 5.

Weisberger disputes this version of the conversation. But defendants do not dispute that, if true, plaintiff's version makes out a claim of retaliation. The credibility issue is for the jury to resolve. Knight v. U.S. Fire Insurance Co., 804 F.2d 9, 11 (2d Cir. 1986), cert. denied, 107 S. Ct. 1570 (1987). n3

n3 Owens argues that a number of other facts also support her retaliation claim. Because I deny defendants' motion on this claim based on the Weisberger-Shen dispute, I need not reach these other grounds.

B. Age Discrimination

To establish her claim of discriminatory discharge based on age, plaintiff must prove that her age was "a determining factor" or "a factor that made a difference" in the Housing Authority's decision to terminate her. Haskell v. Kaman Corp., 743 F.2d 113, 119 n.1 (2d Cir. 1984). Age need not be the sole factor, only a "but for" factor. Hagelthorn v. Kennecott Corp., 710 F.2d 76, 82 (2d Cir. 1983). She can make out a prima facie case of discriminatory discharge by showing (1) that she belonged to the protected age group (40 to 70 years of age), (2) that she was "sufficiently qualified to continue holding h[er] position," (3) that she was discharged, and (4) that her position was filed by a younger person or was held open for such a person. Ibid.

If plaintiff meets this burden, the burden of production shifts to the employer to adduce some legitimate non-discriminatory reason for the discharge. The burden then returns to the plaintiff to show the articulated legitimate basis for the discharge was pretextual. The burden of persuasion remains at all times with the plaintiff. Ibid. At this juncture, of course, Owens need only show there is a genuine issue of fact on these questions. F. R. Civ. P. 56(c).

There is no dispute as to the first, third and fourth elements of Owens' prima facie case. Defendants do contend, however, that she was not qualified for her job — that is the essence of their articulated legitimate reason for the discharge. I find there is a genuine issue of fact on this question.

Owens was a Housing Assistant for three years before Lefkowitz became her supervisor. Apart from the single July 1981 incident, there is no reason to believe Owens was not performing satisfactorily during this period. From references in the depositions on file her work evaluations appear to have been satisfactory. There is also no evidence that her work was unsatisfactory between May 1983 and her discharge in June 1984, when she worked at Carver Houses. Together with her own averments that she performed satisfactorily, this is sufficient evidence of competence to preclude summary judgment on this issue. Cf. Meiri v. Dacon, 759 F.2d 989, 996 n.10 (2d Cir.), cert. denied, 106 S. Ct. 91 (1985) (plaintiff's burden at prima facie stage is de minimis). That supervisors Lefkowitz and Arakel expressed dissatisfaction with her is not surprising, if her averments as to the causes for the poor quality of their relationships are believed, and does not undermine the reasonable inference that she was competent arising from her other periods of employment. See Hagelthorn, supra, 710 F.2d at 82 (plaintiff's statement that "he received a good deal of unjust abuse did not constitute an admission that . . . he was considered inadequate" by his employer). Cf. Knight, supra, 804 F.2d at 11 (on a summary judgment, all ambiguities are to resolved and all reasonable inferences are to be drawn in the nonmovant's favor).

Therefore, I find plaintiff has shown a genuine issue of fact for trial on her prima facie case.

Plaintiff does not dispute that defendants' allegations of insubordination and incompetence meet their obligation to adduce legitimate non-discriminatory reasons for the discharge.

The question, then, is whether plaintiff has adduced sufficient evidence that these reasons are "pretextual" – not necessarily in the sense that they were false, but that "they were not [defendants'] only reasons and that age made a difference." Hagelthorn, supra, 710 F.2d at 82. First, I note that there is no evidence that the hearing examiner was motivated even in part by Owens' age in finding against her or in recommending her termination, or that Housing Authority superiors were so motivated in accepting his conclusions. All the evidence she has adduced concerns Lefkowitz and Arakel. Thus, to prove that age was a determination factor in her discharge, Owens will have to establish at trial that the charges that led to her termination would not have been brought but for her age. Her theory appears to be that her supervisors created their poor relationships, concocted all or some of the charges, and/or sought her discharge instead of granting her initial requests for transfer, because of her age.

Although there is much evidence in the record that Owens was treated unfairly, there is little that this treatment was motivated by age. There is no evidence that younger employees were more readily granted transfers – only evidence that despite her requests she was, for some time, denied transfer. There is no evidence that younger employees, as a group, were treated better than older employees.

The only evidence she offers, other than her replacement by a younger person, that her treatment was motivated in part by age was Lefkowitz' reported comment in February 1983 that her "problems" "had to do with my age and entering menopause." Owens Aff. para. 6. In my view, however, this is sufficient evidence of discriminatory intent to entitle Owens to a trial.

True, this comment was only a small part of the course of harassment Owens alleges. But it is direct evidence of Lefkowitz' state of mind, which cannot be characterized as merely "colorable" or "not significantly probative." Anderson v. Liberty Lobby, Inc., 106 S. Ct. 2505, 2511 (1986). See Meiri, supra, 759 F.2d at 998 ("summary judgment is ordinarily inappropriate where an individual's intent and state of mind are implicated"). Compare ibid. (affirming grant of summary judgment for defendant where plaintiff adduced no non-conclusory evidence of pretext, noting: "The summary judgment rule would be rendered sterile . . . if the mere incantation of intent or state of mind would operate as a talisman to defeat an otherwise valid motion.").

Accordingly, I hold that defendant has failed to show the absence of a genuine issue of fact for trial on the age discrimination issue.

II. Res Judicata

Defendants contend that plaintiff's causes of action are barred by the doctrine of res judicata, or claim preclusion. Specifically, they assert she should have raised them in her Article 78 proceeding.

The claim preclusion doctrine will bar Title VII suits in federal court where a litigant has had a "full and fair opportunity" to litigate the discrimination claim in state court. Kremer v. Chemical Construction Co., 456 U.S. 461, 480 (1982); 28 U.S.C. @ 1738. An unreviewed state administrative determination, however, has no preclusive effect in Title VII suits in federal court even if it would preclude litigation in the courts of the forum state. University of Tennessee v. Elliott, 106 S. Ct. 3220, 3225 (1986). Under the analysis used in Kremer and Elliott, no reason appears to treat ADEA cases differently. The question, then, is whether Owens had a full and fair opportunity to litigate her discrimination claims in state court.

Owens' Article 78 challenge to her dismissal was statutorily limited to these questions: whether the determination was made

in violation of lawful procedure, was arbitrary and capricious or an abuse of discretion, or was not supported by substantial evidence. N.Y. Civ. Prac. L. & R. @ 7803(3), (4). n4 In New York judicial review of state administrative proceedings is confined to the grounds relied upon by the agency. Trump-Equitable Fifth Avenue Co. v. Gliedman, 57 N.Y.2d 588, 593, 457 N.Y.S.2d 466, 468, 443 N.E.2d 940 (1982). Thus, Owens could not raise in the Appellate Division a claim not ruled upon by the administrative hearing judge and the Housing Authority.

n4 Section 7803 provides in full:

The only questions that may be raised in a proceeding under this article are:

1. whether the body or officer failed to perform a duty enjoined upon it by law; or

2. whether the body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction; or

3. whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed; or

4. whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence.

Defendants contend that Owens did raise her discrimination claims in the administrative hearing and that the administrative trial officer rejected them, at least implicitly. The trial officer's memorandum does not bear out this contention. The charges against Owens included allegations that she accused her supervisors of prejudice, perhaps in harsh terms; the references in the trial officer's memorandum to Owens' accusations or prejudice are to these allegations. There is no indication that Owens

litigated her discrimination claims at the administrative hearing or that the trial officer thought they were before him. Since the trial officer did not rule upon Owens' discrimination claims, Owens could not have raised them in the state court and she is not precluded from advancing them here. See Bottini v. Sadore Management Corp., 764 F.2d 116, 121 (2d Cir. 1985) (where Title VII claim was outside scope of arbitration proceeding, state judicial review of arbitration proceeding did not bar subsequent Title VII action in federal court).

Defendants argue that even if Owens did not raise her discrimination claims at the administrative hearings, she should have. But she was not obliged, on pain of future preclusion, to raise her claims in the state administrative forum. Elliott, supra, 106 S. Ct. at 3225. She was entitled "to pursue independently [her] rights under both Title VII [and the ADEA] and other applicable state and federal statutes." Alexander v. Gardner-Denver Co., 415 U.S. 36, 48 (1974) (quoted in id. at 3225 n.5). If, as Elliott holds, a plaintiff may advance a Title VII claim in federal court even after intentionally invoking a state's administrative anti-discrimination apparatus, surely a plaintiff may do so after being hailed before a state administrative tribunal convened not to investigate the plaintiff's discrimination charges but to resolve disciplinary charges against the employee.

Furthermore, even if Owens had tried to raise the claims presented here it is not clear the presiding officer would have been authorized to resolve them. The purpose of the tribunal was to try the disciplinary charges. Surely the trial officer would have considered a defense that prejudice caused Owens' supervisors to make up the disciplinary charges out of whole cloth. But that it not the only issue here. In this lawsuit Owens may succeed even if some or all of the charges are true, if her age or her protected "opposition" or "participation" were also "but for" causes of the charges being brought or a lesser sanction sought.

Defendants offer no authority for the proposition the trial officer could have considered such a claim, and the statute

suggests he could not. The statute provides only one analogous defense: a hearing officer must dismiss disciplinary charges if they "would not have been brought but for" the employee's disclosure of improper governmental actions to a governmental body. N.Y. Civ. Serv. Law @ 75-b(2)(a), (3)(a). There is no parallel provision for charges brought because of animus based on race, sex, religion or age.

Finally, the most closely apposite New York authority cited by the parties, or that I have found, suggests that New York courts would not give preclusive effect to the Article 78 proceeding. See State Division of Human Rights v. City of Syracuse, 57 A.D.2d 452, 394 N.Y.S.2d 948 (4th Dep't 1977), aff'd mem. 43 N.Y.2d 958, 404 N.Y.S.2d 343, 375 N.E.2d 409 (1978) (entertaining appeal from determination of state human rights appeal board even though complainant had lost previous Article 78 challenge to results of related administrative disciplinary hearing; no claim preclusion argument raised). If New York courts would not give preclusive effect to the Article 78 proceeding, it has no such effect here. 28 U.S.C. @ 1738.

For all these reasons, I reject defendants' argument that this lawsuit is barred by the doctrine of res judicata.

Conclusion

Defendants' motion for summary judgment is denied in its entirety.

It appears from the Court file that discovery should be complete. Accordingly, the parties are directed to appear to a final pre-trial conference September 18, 1987 at 3:00 p.m. in Room 307 of this Courthouse.

It is SO ORDERED.

MILDRED DANIELSON, Plaintiff-Appellant, v. CITY OF LORAIN, Defendant-Appellee

No. 90-3666

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

May 9, 1991, Argued
July 16, 1991, Decided
July 16, 1991, Filed

PRIOR HISTORY:

On Appeal from the United States District Court for the Northern District of Ohio; No. 88-04399; Alice M. Batchelder, District Judge.

COUNSEL: For Plaintiff - Appellant, Robert A. Dixon, ARGUED, Mase, Mergenthaler & Slominski, Cleveland, Ohio.

For Defendant - Appellee, Mark J. Mihok, ARGUED, Lorain, Ohio.

JUDGES: Keith and Boggs, Circuit Judges; and William O. Bertelsman, District Judge. *

* The Honorable William O. Bertelsman, United States District Judge for the Eastern District of Kentucky, sitting by designation.

OPINION BY: KEITH

OPINION: Plaintiff Mildred Danielson ("Danielson") appeals from the June 20, 1990, order entering a directed verdict for defendant City of Lorain (the "City") in this suit alleging age discrimination. For the following reasons, we AFFIRM.

I.

Danielson was first employed by the City on September 20, 1976, at the age of fifty-seven. She was initially hired as a clerk-typist and on August 13, 1979, she was appointed to the position of secretary in the Fire Department. She held this position until May 25, 1984, when she was laid off as part of a city-wide reduction in work force. Approximately eight months later, she requested assignment to a vacant position in the Utilities Department.

Danielson was interviewed by the service director, Richard Koba ("Koba"), and in January 1985 was recalled from layoff to fill the position of clerk-cashier in the Utilities Department. She was sixty-five years of age when she was recalled to this position. Shortly after she started the job, she was told by her Department Manager, Arthur DeAngelis ("DeAngelis"), that she "would never make it" on the job. Transcript at 18 (Testimony of Danielson).

In November 1985, after returning from sick leave, Danielson was called into the office of the utility director, John Rybarczyk ("Rybarczyk"). The only other person at the meeting was DeAngelis. Danielson alleges that at this meeting Rybarczyk told her that, because of her age, she should consider retirement. He pointed out to her that there were things that he could not do anymore because of his age, giving painting his house as an example. Danielson alleges that DeAngelis was in agreement with Rybarczyk's comments. Id. at 21-22. She made notations of these comments on the back of a paycheck stub after the meeting. Id. at 29; Joint Appendix at 18. Rybarczyk denied Danielson's accusation at trial, stating, "To my knowledge, sir, there was nothing said about age at any meeting." Transcript at 312 (Testimony of Rybarczyk).

In July 1986, Danielson was given a two-week disciplinary suspension after one verbal and two written reprimands for alleged poor work performance. Id. at 19-20; Joint Appendix at 31-32. The verbal reprimand was on September 6, 1985, and

the first written reprimand was on October 4, 1985. These reprimands were, therefore, before the November 1985 meeting at which the alleged discriminatory statement was made. The second written reprimand was dated April 4, 1986. Joint Appendix at 28-30.

On November 25, 1986, Danielson was terminated by the City. The decision was made by Koba based upon the information and recommendation provided by Rybarczyk, which included reports from DeAngelis and Alery Turcus ("Turcus"), Danielson's immediate supervisor, as well as testimony of employees at her discharge hearing. Transcript at 105-06, 116-17 (Testimony of Koba). Turcus had written numerous memoranda to DeAngelis concerning Danielson's poor work quality. Joint Appendix at 20-21, 33-37, 40, 42, 45-46. Danielson testified that she could not conclude that age was a factor in Turcus' treatment of her. Transcript at 40-41 (Testimony of Danielson). All levels of supervisory personnel complained of her inability to grasp job requirements despite training and counselling. Joint Appendix at 19-50. DeAngelis received written complaints from other office personnel. Id. at 241-47 (Testimony of DeAngelis). She had been reprimanded previously and then suspended.

On November 30, 1988, Danielson filed this suit alleging that she was terminated on the basis of her age, in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634. On June 18, 1990, a jury trial was commenced. The City stipulated that Danielson was replaced by a younger person outside of the protected age group. The district court reserved ruling on defendant's Motion for Directed Verdict presented at the close of Danielson's case. On June 20, 1990, after the close of the City's case, the district court granted the motion in favor of the City. Danielson filed a timely notice of appeal on July 19, 1990.

II.

A.

Our standard of review of motions for directed verdict is identical to the standard used by the district court. King v. Love, 766 F.2d 962, 969 (6th Cir.), cert. denied, 474 U.S. 971 (1985). We must view the evidence in a light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences. Kitchen v. Chippewa Valley Schools, 825 F.2d 1004, 1015 (6th Cir. 1987). The motion should be granted if there are "no controverted issues of fact upon which reasonable [people] could differ." Id.

We have held that we generally apply to ADEA age discrimination cases the same analysis applied to discrimination cases under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, according to McDonnel Douglas Corp. v. Green, 411 U.S. 792 (1973). Chappell v. GTE Prods. Corp., 803 F.2d 261, 265 (6th Cir. 1986). Under this analysis, plaintiff must first establish a prima facie case. The prima facie case creates a presumption of discrimination, which requires the defendant to articulate a legitimate, nondiscriminatory reasons for the dismissal. It is then the plaintiff's burden to establish that discrimination was a determinative factor in the dismissal. Id. at 265. In an ADEA suit, a prima facie case is established if the plaintiff shows that he or she is a member of the protected age group, that the plaintiff was discharged, that the plaintiff was qualified for that position (or that he or she was doing the job well enough to meet the employer's legitimate expectations), and that the plaintiff was replaced by a younger person. Id. at 265-66. The district court accepted arguendo that Danielson had made out a prima facie case. Transcript at 325.

B.

The district court found, and we also conclude, that the City articulated a legitimate, nondiscriminatory reason for dismissing her — poor work performance. Once the City articulated

a 8legitimate nondiscriminatory reason, the burden shifted back to Danielson to prove by a preponderance of the evidence that the reason articulated was a pretext for intentional age discrimination. See Chappell, 803 F.2d at 265.

Danielson argues that the evidence of the City's articulated reason of poor work quality was attacked sufficiently so that a reasonable finder of fact could have rejected it and found in her favor. To support her claim, Danielson testified that Rybarczyk suggested she retire because of her age. Danielson also sought to establish doubt over whether all of the mistakes attributed to her poor work performance were the result of her work and not the mistakes of others. Danielson argues that a reasonable fact finder could have determined that Rybarczyk decided that Danielson, because of her age, should retire and that when she refused, with age as a determinative factor, he began creating a paper trail to establish inadequate work to achieve his desired result. Appellant's Brief at 110-11.

If the scenario Danielson proffers accurately described the events leading to Danielson's dismissal, she would be entitled to judgment no matter how inadequate her work performance was. See Neufeld v. Searle Laboratories, 884 F.2d 335, 339 (8th Cir. 1989). The ADEA establishes that age may not be a determinative factor in a dismissal of a member of the protected age group no matter how poorly a worker performed. However, if a plaintiff is not able to establish that she performed the job at a level which met the employer's legitimate expectations or that the accusation of poor work was only a pretext, the claim for discrimination cannot be successful. Id.; Chappell, 803 F.2d at 266.[1] Workers who poorly perform their jobs will not be insulated from dismissal simply because they are members of the protected age group.

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[1] As the Eighth Circuit noted in Neufeld, "In this context, the requirement that a discriminatory-discharge plaintiff show that he [or she] met his employer's legitimate expectations simply announces the plaintiff's burden of proving that he [or she] would have been retained in the absence of unlawful bias." Neufeld, 884 F.2d at 339 (citations omitted).

C.

We find that a reasonable fact finder could not determine, based on the factual record established in this case, that poor work performance was merely a pretext for a dismissal that was based on Danielson's age. Speaking of the numerous errors attributed to Danielson in contemporaneous memoranda, the district court stated, "There is no evidence whatever that those mistakes are someone else's mistakes, or that there was any error made by the employees and supervisors who reported those mistakes." Transcript at 326. Our review of the record confirms this conclusion. Danielson admitted making mistakes, but claimed that she made no more than other employees. Id. at 61. Several other employees reported that Danielson made numerous errors. Danielson did not show that the mistakes attributed to her were made by others. She only showed that the procedures used in Danielson's office were such that it was possible, but not likely, that the errors were created by someone else. She completely failed to meet her burden of proof in showing, by a preponderance of the evidence, that her poor work performance was merely a pretextual reason for her dismissal.

There is strong evidence that Danielson's work was indeed substandard. An early performance review for the period ending June 30, 1985, and completed in October 1985 described Danielson as satisfactory in most areas, but needing improvement in seven of twenty areas, including accuracy in work. Joint Appendix at 14. That review was completed more than a month before the meeting in which Rybarczyk allegedly made an age-based comment and which allegedly precipitated the plan to establish a pretextual paper record. Subsequent evaluations described her work as below satisfactory in virtually all areas. Id. at 15-16.

There is no evidence that Koba, who dismissed Danielson, harbored any age-based animus. Danielson was fired by the same person, Koba, who hired her at the age of sixty-five, only two years before her dismissal at age sixty-seven. It is true Koba dismissed her based on the recommendation and file prepared

by Rybarczyk, but the file included letters of complaint by other supervisors about whom Danielson testified she had no evidence they treated her differently because of her age. She merely surmised that since she felt she did not make many mistakes, age discrimination could be the only reason supervisors complained. Transcript at 63-64 (Testimony of Danielson).

We assume for the purpose of this appeal that the fact finder would credit Danielson's allegation that Rybarczyk said he thought she should consider retiring because of her age. Even though such a statement is strong evidence of an illegitimate motive, the record clearly establishes a poor working record that began before the alleged statement and which was documented by several complaining supervisors. The recommendation by Rybarczyk came a year after the alleged discriminatory remark and at least a year and a half after poor work was alleged. Months after the statement, she had been given a disciplinary suspension following a hearing. Danielson never alleged age discrimination in that hearing, despite the alleged comment and her alleged contemporaneous recording of that comment. We conclude that a reasonable fact finder could not find that all of Danielson's supervisors created a false paper trail for the purpose of dismissing her because of her age and waited a year before presenting the fabricated record to Koba, recommending dismissal. We, therefore, conclude that Danielson failed to establish that a reasonable fact finder could have found that poor work performance was merely a pretextual reason for her dismissal and that age was a determinative factor.

III.

For the foregoing reasons, we AFFIRM the June 20, 1990, order of the Honorable Alice M. Batchelder, United States District Judge for the Northern District of Ohio.

MARIO MLINARIC, Plaintiff-Appellant, v. PARKER HANNIFIN CORPORATION, Defendant-Appellee

No. 87-3112

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION SIXTH CIRCUIT RULE 24 LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 24 BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

(Disposition Reported at 853 F.2d 927)

August 5, 1988, Filed

PRIOR HISTORY:

On Appeal from the United States District Court for the Northern District of Ohio, C-84-405

OPINION BY: WOODS

OPINION: Before: KEITH and NORRIS, Circuit Judges; and WOODS, District Judge. *

* The Honorable George E. Woods, United States District Judge for the Eastern District of Michigan, sitting by designation.

Opinion for the Court filed by District Judge Woods:

Plaintiff-appellant Mario Mlinaric appeals the orders of the District Court (1) bifurcating plaintiff's age and national origin discrimination claims; (2) dismissing plaintiff's retaliation claims;

(3) directing a verdict in favor of defendant-appellee Parker Hannifin Corporation on plaintiff's age discrimination claim; and (4) granting judgment in favor of defendant on plaintiff's national origin discrimination claim. We affirm each order of the District Court.

Plaintiff was born in Italy in 1936, at a time in which Italy occupied a present-day Yugoslavian area known as Croatia. He moved to Rome at the age of seven, remaining there until he immigrated to this country in 1956.

Several months after his arrival, plaintiff settled in Cleveland and began working for Z & W Corporation. Defendant acquired Z & W Corporation in the 1960's. Plaintiff thereafter advanced in skill and wage rates. By 1974, plaintiff attained a Machine Builder and Repair A position, one of the top paid positions for hourly workers. Plaintiff continued to work at the Eastlake, Ohio plant until November of 1981, when defendant began to phase out the plant. As a result of the phase-out, defendant transferred plaintiff and many other Eastlake employees to its plant in Wickliffe, Ohio.

The transfer of the Wickliffe employees to the Eastlake plant took place in accordance with a collective bargaining agreement (CBA) between defendant and plaintiff's union. Under Article VII of the CBA, plaintiff and other transferred employees could use their superior seniority to "bump" less senior employees "provided they had the skill and ability to perform the work involved."

Defendant's Wickliffe management held several meetings with hourly employees and the union in an effort to facilitate the transfer of Eastlake employees into Wickliffe and to improve the morale of affected Wickliffe employees. By January of 1982, approximately 230 personnel moves had occurred. To minimize the changes, defendant and the union agreed to interpret the "skill and ability to perform" bumping prerequisite as requiring a bumping employee to have the ability to "walk up and do" the desired job. Plaintiff testified and introduced other

evidence that the "skill and ability" standard was the sole requirement for bumping; the majority of evidence indicated, however, that defendant and the union applied the "walk up and do" standard. For example, a former union representative admitted that the union filed a grievance on behalf of an employee to force the defendant to adhere to the "walk up and do" standard.

Prior to transferring, plaintiff and other Eastlake employees were informed as to possible positions into which they could bump. Plaintiff's seniority and job experience enabled him to bump into almost any job in the Wickliffe plant. Defendant advised all employees to consider bumping into lesser job classifications if they were unsure of their ability to "walk up and do" a particular job. An employee unable to do a particular job would be "disqualified." Disqualification meant demotion to the least senior available job in the plant. Plaintiff elected to bump into the Machine Builder and Repairman (All Around) job, a position with a job description identical to the Machine Builder and Repair "A" position plaintiff held at the Eastlake plant. The Eastlake plant, however, did not contain the automatic equipment present in the Wickliffe plant. Automatic equipment constituted the overwhelming majority of the primary production and repair work at Wickliffe. Plaintiff nevertheless assured John Minarich, the Wickliffe plant manager, that plaintiff could perform the job.

Soon after plaintiff's transfer, Minarich and John Dorsey, plaintiff's immediate supervisor, found that plaintiff was not satisfactorily performing his job. Although plaintiff experienced difficulty making some of the repairs, his main difficulty was that he was too slow in repairing the machines. Minarich advised Dorsey to keep notes documenting plaintiff's performance. Several of defendant's managers, from approximately December of 1981 to January of 1982, warned plaintiff that he was in danger of being disqualified. Defendant's managers provided plaintiff with parts books and manuals, while continuing to monitor plaintiff's performance.

A factor that could have affected plaintiff's ability to efficiently perform repairs was plaintiff's excessive use of valium. On cross-examination, plaintiff admitted that he needed valium to help control his hypertension, but took more valium than his three times a day prescription. Plaintiff stated that he took additional valium because of his asthma condition and his difficulty sleeping at night. He also admitted to taking the medication while at work.

In February of 1982, after plaintiff had worked on the machine builder-repairer job for ten weeks, defendant disqualified plaintiff. Plaintiff filed a grievance to overturn the disqualification During the grievance procedure, the union contended that plaintiff was discriminated against and harassed, as shown by the scrutiny of plaintiff by his foreman and the lack of assistance he received from his foreman and fellow workers. Defendant, on the other hand, contended that plaintiff was given a fair sampling of repair work, but failed to perform in a "workmanlike" manner. Defendant and the union subsequently agreed that plaintiff would be reinstated and given a second chance to perform the job.

Once again, notes were kept of plaintiff's performance. After three weeks on the job, plaintiff's performance remained substandard, in defendant's view, resulting in a second disqualification. The union again grieved plaintiff's disqualification, raising the same arguments as before. Defendant contended that plaintiff's performance remained substandard despite the instruction he was given on machine assemblies and the help he received from co-workers. This time, however, the grievance was not resolved. The union had the option of taking plaintiff's unresolved grievance to a strike vote, but declined to do so. As a result, plaintiff was disqualified and placed in his present hourly position at defendant's Wickliffe plant.

Plaintiff filed suit in February of 1984. Prior to trial, defendant moved to bifurcate issues of liability from damages, as well as the non-jury claim (Title VII claim based on national origin) from the jury claims (age discrimination and pendent state

claims). The district court denied bifurcation of damages and liability, but granted bifurcation of the jury and non-jury claims. The court also declined to exercise pendent jurisdiction over the state law claims. Thus, at the time of trial, the age discrimination claim remained to be tried to a jury, and the national origin discrimination claim remained to be tried before the court.

After five days of trial before the jury on plaintiff's age discrimination claim, the district court granted a directed verdict in favor of defendant at the close of plaintiff's case. Trial before the court immediately commenced and continued for five additional days on the national origin discrimination claim. The district court thereafter issued a written decision in favor of defendant on the national origin claim.

1. BIFURCATION

Plaintiff contends that the district court erred in bifurcating his age and national origin discrimination claims. Plaintiff asserts that bifurcation was inappropriate due to the overlap of facts and issues in the two claims. He also believes that bifurcation hindered the ability of his witnesses in the national origin claim to respond to defendant's questions on cross-examination. We disagree.

(b) Separate Trials. The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States.

Plaintiff was not entitled to receive, and made no request for, a jury trial on his national origin discrimination claim, which he brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. Harris v. Richards Manufacturing Co.,

675 F.2d 811 (6th Cir. 1982). Plaintiff timely demanded a jury trial on his age discrimination claim.

The Federal Rules of Civil Procedure clearly contemplate separate trials of jury and non-jury issues. The Notes of the Advisory Committee to Rule 39 state that "[w]hen certain of the issues are to be tried by jury and others by the court, the court may determine the sequence in which such issues shall be tried. See Liberty Oil Co. v. Condon Nat. Bank, 260 U.S. 235, 43 S. Ct. 118, 67 L.Ed. 232 (1922)." This language at one time was contained in a draft of the rules, but was removed since "the power is adequately given to Rule 42(b)." Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 513 n.3 (1959) (Stewart, J., dissenting).

The decision of whether to try issues separately rests within a trial court's sound discretion. An abuse of discretion will be found only where a reviewing court is left with a "definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors." Yung v. Raymark Indus., Inc., 789 F.2d 397, 400 (6th Cir. 1986). As Rule 42(b) indicates, relevant factors include the potential prejudice to the parties, potential confusion to the jury, and the relative convenience and economy that would result from separate trials. In re Beverly Hills Fire Litigation, 695 F.2d 207, 216 (6th Cir. 1982), cert. denied sub nom. Bryant Electric Co. v. Kiser, 461 U.S. 929 (1983).

Contrary to plaintiff's assertions, we see little overlap of facts that would justify presenting evidence applicable to a (non-jury) national origin discrimination claim to a jury charged with considering an age discrimination claim. We do not believe that the shifting burden of proof requirement, see Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981), applicable to both claims, cf. Kitchen v. Chippewa Valley Schools, 825 F.2d 1004, 1010-12 (6th Cir. 1987), required a joint trial of both claims.

Nor do we find that plaintiff was prejudiced by the separate trials. Plaintiff asserts that defense counsel, during the age discrimination claim, was unfairly able to cross-examine plaintiff

and one of plaintiff's witnesses regarding an Equal Employment Opportunity Commission (EEOC) proceeding. Plaintiff contends that he and his witness could not fully answer because a complete answer to defense counsel's questions would have required an explanation of the EEOC's investigation of his national origin discrimination claim. Nevertheless, the prejudice to plaintiff, even if it occurred, was far outweighed by the likely prejudice to defendant in jointly trying the two claims. The national origin claim under Title VII was a much stronger claim than the age discrimination claim and the district court did not abuse its discretion in concluding that the jury would confuse the evidence offered on each claim. Moreover, all of the alleged incidents of name calling, burning, harassment, etc., were offered to support the national origin claim. Hearing such evidence could have prejudiced the jury's consideration of the age discrimination claim. The district court, in our view, adopted the least prejudicial approach in trying the two claims separately.

2. RETALIATION CLAIM

On March 26, 1982, plaintiff filed a charge with the EEOC, alleging that he had been laid off on February 2, 1982 because of his national origin, Croatian, and age, forty-six. On December 29, 1983, the EEOC issued plaintiff a Notice of Right to Sue on both claims. Plaintiff's EEOC charge and the EEOC's subsequent investigation made no mention of defendant's alleged retaliation.

On May 17, 1984, plaintiff filed a complaint with the Ohio Civil Rights Commission, again raising claims of national origin and age discrimination arising from the February 2, 1982 layoff. This complaint, which did not mention retaliation, was dismissed as untimely.

Plaintiff first referred to retaliation in his complaint and supplemental complaint filed with the district court. The district court permitted plaintiff to introduce evidence concerning retaliation which allegedly occurred in 1984 and 1986, after plaintiff had returned to work in July of 1984 following a

two-year injury layoff. Plaintiff testified that defendant failed to accommodate his work limitations caused by his knee and back injuries. At the close of the jury trial, the district court dismissed plaintiff's retaliation claim, concluding that plaintiff should have presented the claim to the EEOC. Plaintiff argues that the retaliation claim did not have to be raised in the EEOC proceeding since the claim was reasonably expected to grow from the EEOC charge.

In Tipler v. E.I. duPont de Nemours & Co., 443 F.2d 125, 131 (6th Cir. 1971), this Court held that a party's complaint in a judicial proceeding is limited only "to the scope of the EEOC investigation reasonably expected to grow out of the charge of discrimination." The scope of the investigation is broadly construed because discrimination charges filed with the EEOC often are brought by lay persons "unfamiliar with the niceties of pleading and are acting without the assistance of counsel." Id. Courts generally find that claims of retaliation reasonably can be expected to grow out of a discrimination charge and permit such claims to be brought by an individual without prior resort to the EEOC. E.g., Gupta v. East Texas State Univ., 654 F.2d 411 (5th Cir. Unit A 1981).

The difficulty with applying the above standards to the instant case is that plaintiff's retaliation claims arise from events completely unrelated to his earlier EEOC claims. The EEOC charge and Ohio Civil Rights complaint concern alleged national origin and age discrimination claims arising from plaintiff's February 2, 1982 layoff. The retaliation claim, on the other hand, concerns events occurring in 1984 and 1986 after plaintiff returned to work from a two-year layoff. Plaintiff's retaliation claim arose well after the termination of the EEOC investigation and the issuance of the right to sue notice and could not be "reasonably expected to grow out of" the discrimination charges. Under these circumstances, the district court did not err in concluding that it lacked subject matter jurisdiction over plaintiff's retaliation claim because plaintiff failed to file that charge with the EEOC.

3. AGE DISCRIMINATION

Plaintiff next claims that the district court erred in directing a verdict in favor of defendant on his claim under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 et seq. A directed verdict is appropriate when the evidence is such that reasonable minds could reach but one conclusion as to the proper verdict. Gomez v. Great Lakes Steel Division, National Steel Corp., 803 F.2d 250, 254 (6th Cir. 1986). In making that determination, a court may not pass on the credibility of witnesses, but must view all evidence in the light most favorable to the unmoving party, drawing all reasonable inferences in that party's favor. Id.

Applying literally the four criteria of McDonnell Douglas v. Green, 411 U.S. 792 (1973), to the ADEA claim requires plaintiff to show that he was

(1) a member of a protected class (age 40 to 70);

(2) subjected to adverse employment action;

(3) qualified for the position; and

(4) replaced by a younger person.

Simpson v. Midland-Ross Corp., 823 F.2d 937, 940 (6th Cir. 1987). Once plaintiff establishes a prima facie case of age discrimination, the burden of production shifts to the defendant employer to provide a legitimate nondiscriminatory reason for the adverse employment action. Id. (citing Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981)). Should the employer articulate a legitimate reason for its employment action, the plaintiff has the burden of showing that the stated reason is merely pretextual or a cover-up for what in truth was a discriminatory purpose. Ridenour v. Lawson Co., 791 F.2d 52, 56 (6th Cir. 1986); Wilkins v. Eaton Corp., 790 F.2d 515, 521 (6th Cir. 1986). In evaluating such claims, this court consistently has eschewed a blind, mechanistic application of the McDonnell

Douglas criteria, see Simpson, 823 F.2d at 940-41 (citing cases), preferring instead a case-by-case approach that recognizes the realities of the business world. Laugesen v. Anaconda Co., 510 F.2d 307, 312 (6th Cir. 1975).

It is clear that plaintiff (1) was 46 years of age and within the class of persons protected under the ADEA; (2) held a machine builder-repairer position for several years prior to his transfer and had performed well; (3) was disqualified from a job; and (4) was replaced by a 29 year-old man with lesser seniority and experience. Although that would appear to establish a prima facie case, two additional facts must be noted. First, plaintiff was replaced by a 29 year-old employee, not by defendant's choosing, but by operation of the CBA. Second, plaintiff made little showing that he was qualified for the Wickliffe position. As noted above, plaintiff's experiences at Eastlake did not involve automatic machines and did not equip him to "walk up and do" the repairs needed at Wickliffe.

As an alternative to the McDonnell Douglas criteria, a plaintiff can prove discrimination through statistical or other direct evidence. Simpson, 823 F.2d at 940. Plaintiff claims that "statistically" the maintenance department was aging and that defendant's managers, during contract negotiations with the union, expressed concerns regarding the high cost of employee benefits for the older workers. The difficulty with accepting plaintiff's statistical showing, however, is that seven of the twelve employees in the maintenance department were older than plaintiff. None of the older employees reported discrimination. Moreover, plaintiff was approximately five years younger than the average age in the department. Defendant would have laid off or fired one or more of its older employees had it truly wished to lower costs. Finally, defendant did not significantly lower its costs since plaintiff was disqualified, not discharged. Plaintiff's salary was reduced a mere thirty-two cents an hour.

The only direct evidence of alleged age discrimination offered by plaintiff is the showing that several of defendant's managers formed friendships with some of the younger employees. The

evidence of friendships with the younger employees, however, fell far short of supporting an inference that age entered into the defendant's decision to disqualify plaintiff. We hold, therefore, that the district court did not err in granting a directed verdict in favor of defendant on plaintiff's age discrimination claim.

4. NATIONAL ORIGIN

Plaintiff finally argues that the district court erred in entering judgment for defendant on the national origin discrimination claim. Plaintiff disagrees with the district court's findings of fact, believing that he proved by a preponderance of the evidence that he was subjected to a hostile working environment due to his national origin.

A district court's factual findings cannot be set aside unless they are found to be clearly erroneous. F.R.Civ.P. 52(a). Factual findings are clearly erroneous when, although they are supported by evidence, a reviewing court after review of all the evidence "is left with the definite and firm conviction that a mistake has been committed." Rabidue v. Osceola Refining Co., 805 F.2d 611, 616 (6th Cir. 1986) (citing Anderson v. Bessemer City, 470 U.S. 564 (1985)), cert. denied, 107 S. Ct. 1983 (1987). Moreover, under Rule 52 a reviewing court must give even greater deference to a district court's findings when they are based on determinations of credibility. 805 F.2d at 616 (citing Anderson, 470 U.S. at 575).

Title VII prohibits all forms of discrimination in employment based on race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a). An employer violates Title VII when it creates or tolerates a "hostile working environment" that is "so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group members." Erebia v. Chrysler Plastic Products Corp., 772 F.2d 1250, 1254 (6th Cir. 1985) (quoting Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972)), cert. denied, 475 U.S. 1015 (1986); Torres v. County of Oakland, 758 F.2d 147,

152 (6th Cir. 1985) (national origin discrimination claim based on hostile working environment). To be actionable, the incidents of national origin slurs must be more than occasional or sporadic. Id. It must also be shown that the employer, through its agents or supervisory personnel, knew or should have known of the harassment and failed to take reasonable steps to remedy the situation. Erebia, 772 F.2d at 1254; cf. Rabidue, 805 F.2d at 621 (sex discrimination claim based on hostile working environment).

The testimony of plaintiff and his witnesses differed sharply from the testimony of defendant's witnesses with respect to each of the alleged incidents of national origin discrimination. Plaintiff testified that he was the victim of harassment and name calling on an almost hourly basis by other maintenance department employees. He stated that they referred to him as "DP Mario," n1 and frequently scribbled that name on the door of his locker and on the walls in the men's lavatory. During lunch periods, a couple of the maintenance department employees would often laugh at plaintiff and "spit right in front of him." (R. 586) Plaintiff also mentioned one occasion in which his tools were scattered on the floor of the maintenance department. Several of the tools were never located and he believes they were stolen. Plaintiff also mentioned the deliberate and malicious burning of his workbench. Plaintiff further testified that he was not given assistance by defendant's maintenance department managers, nor was he provided with manuals to enable him to complete repairs. On several occasions when he successfully repaired a machine, the machine would be sabotaged by other employees, who would then falsely blame plaintiff for failing to make a proper repair.

Defendant's witnesses, in contrast, testified that the incidents of name calling directed toward plaintiff were isolated incidents, which consisted of mere locker-room conversation and

n1 "DP" was an acronym for the term "displaced person," an apparent reference to an individual's immigration into the United States.

humor. They stated that plaintiff was not subject to such abuse on an hourly or even daily basis. To the extent such hostility occurred, it resulted from the co-workers' dislike of plaintiff, their belief that plaintiff was unable to perform his job. and their concern that plaintiff and other employees from Eastlake would assume the jobs held by Wickliffe employees. Moreover, the worker who scattered plaintiff's tools testified that he was reprimanded for his actions and never again engaged in such activity. Defendant's managers also investigated the burning of plaintiff's workbench. They discovered that the workbench accidentally burned when an employee on a later shift used the bench for welding and inadvertently burned the cardboard top of the bench.

Defendant's witnesses also stated that the manuals plaintiff requested were always available. They believed that the jobs on which plaintiff requested assistance were one-man jobs. Although defendant's management could have given plaintiff greater assistance in learning to repair automatic machines, the management had to comply with the "walk up and do" requirement derived from the CBA. Defendant's witnesses further testified that plaintiff's disqualification on both occasions resulted from his deficient and untimely repairs.

In short, there is insufficient evidence that defendant's management tolerated or failed to correct a work situation that was so heavily polluted with national origin discrimination so as to affect plaintiff's emotional and psychological stability. There was no evidence that defendant's management ever referred to plaintiff's national origin or used his national origin as a reason for either disqualification. As a result, we find no error in the district court's factual findings and affirm the judgment for defendant on the national origin discrimination claim.

For the foregoing reasons, the district court's judgment is hereby AFFIRMED.

KEITH, Circuit Judge, concurring in part and dissenting in part.

DISSENT: KEITH, J., Concurring in Part and Dissenting in Part: I concur with the portion of the majority opinion which finds no merit in Mr. Mlinaric's bifurcation, age discrimination or retaliation claims. However, I must dissent with respect to the national origin claim. After review of the facts, I can come to no other conclusion than that the district court was clearly erroneous in determining that there was not sufficient evidence to establish discrimination on the basis of national origin.

To say that the facts of this case are compelling is an understatement. Mr. Mlinaric testified that he was constantly harassed and threatened. He was persistently insulted with the ethnic slur "DP," initials which stand either for "displaced person" or "dumb Polack." "DP" was shouted at him and written on his locker. During a union election, an employee passed out hats that said "Don't vote for DP Mario." He was incessantly called a "DP son-of-a-bitch"; coworkers said "DP Mario doesn't know anything," and "if that DP comes back I'm quitting." Mlinaric was bombarded with comments such as, "they're going to ship you back," and "they're going to put you back on the first boat." He was also repeatedly called a "fucking DP." Perhaps most indicative of the atmosphere of the plant was the drawing in the men's restroom of a stick figure with a wrench and a noose around his neck: the words "Good-bye DP Mario" were scrawled alongside. The plant manager testified that "Fuck all DPs" was also written on a stall in the men's room.

Mr. Mlinaric's fellow employees spit at him. He testified that they refused to assist him, refused to give him manuals so that he could learn more about his machine, and refused to eat with him. Graffiti was scrawled on his locker; it was broken into, and items were stolen. His workbench was set afire and irreparably scorched. He claims that his replacement workbench was covered with garbage each morning. His tools were strewn around the floor. Mr. Mlinaric reported the harassment to his superiors, who did nothing.

I am unsure just how much more harassment, short of physical brutality, that the district court would have required before it

was satisfied that Mr. Mlinaric was discriminated against on the basis of his national origin. To me, it is abundantly clear that the pervasive atmosphere of endless, cruel harassment contaminated and blackened the workplace environment. I am left only with the "definite and firm conviction that a mistake has been committed" by the court below. Anderson v. Bessemer City, 470 U.S. 564 (1985).

The district court ruled that the employees' hostility toward Mr. Mlinaric was traceable not to national origin, but instead to a general hostility and concern over their own jobs. While this is an understandable fear, it should not translate into attacks laced with slurs referring to national origin. I fail to understand what the name-calling, the drawing of plaintiff with a noose around his neck, the graffiti and persistent use of "DP" were, if not attacks based upon national origin. In my opinion, the plant's management was under an obligation to aggressively intervene to stop this endless harassment of Mr. Mlinaric, and to mute the hostile environment at the plant.

The district court dismissed the national origin claims because the testimony was conflicting, stating that defendant's witnesses, while admitting to some level of harassment, adequately explained the insults away as "mere shop talk," and the graffiti as "minimal." Similarly, the majority appears to believe that the incidents of name calling were "mere locker room conversation and humor," thereby suggesting that Mr. Mlinaric should "lighten up" and learn how to take a joke. But, just as degrading references to Jews, blacks or women negatively impact the psychological health of those groups, ethnic "jokes" are similarly debilitating to the peoples targeted by them. A work environment that encourages and condones such treatment of diverse peoples quashes productivity and potential, and fosters low self-esteem Moreover, the continual use of ethnic slurs couched "in fun" insidiously but effectively perpetuates the sorry and ridiculous stereotype of Eastern Europeans as a slow and stupid people. That some would want to build themselves up by callously degrading others is not surprising. What is surprising, however, is the majority's implicit acceptance of the idea that

slurs against a class of people, if said as a "joke," sufficiently erases the taint of discrimination.

I therefore conclude that evidence of the hostile environment in which Mr. Mlinaric worked was sufficient to meet his Title VII claim. For the above reasons, I respectfully dissent and would reverse as to Mr. Mlinaric's national origin claim.

Administrative Trial Officer's Report and Recommendation to the Housing Authority Regarding Ms. Owens Disciplinary Trial

NEW YORK CITY HOUSING AUTHORITY

CONFIDENTIAL

To: Authority Members

From: Jonathan E. Raines, Trial Officer

Subject: Disciplinary Proceedings - Catherine Owens

Housing Assistant

The above named employee, Catherine Owens, a Housing Assistant, was charged with incompetency and misconduct as follows:

1. on or about July 21, 1981,

a) you directed abusive and insulting language toward your supervisor; and

b) when directed by him to leave his office you refused, or otherwise disobeyed.

2. On or about September 2, 1982 you disobeyed a direct order by your supervisor to accompany a co-worker in the field and were otherwise insubordinate.

3. On or about September 3, 1982 when the Assistant Manager of the project attempted to counsel you, you directed foul and abusive language at him, and were otherwise insubordinate.

4. On or about February 18, 1983,

a) in violation of the norms of office behavior you played your personal radio at a high volume; and

b) when told to desist by the Housing Manager you directed insulting and offensive language at him and were otherwise insubordinate.

5. On or about March 2, 1983 in response to an inquiry from the Assistant Manager concerning your work, you were loud and abusive and directed foul language toward him and were otherwise insubordinate.

6. On or about March 10, 1983 you were insubordinate and disrespectful towards the Manager and Assistant Manager by leaving a counselling session they were conducting with you, without their permission and against their wishes.

7. On or about March 10, 1983 you physically menaced the Housing Manager by shaking your finger in his face and striking him therewith and were otherwise insubordinate.

8. On or about March 22, 1983,

a) you were loud and abusive toward the Assistant Manager; and

b) you falsely accused him of molesting you and were otherwise insubordinate.

9. On or about March 23, 1983 you were loud and abusive and directed foul language at the Assistant Manager and were otherwise insubordinate.

10. On or about March 28, 1983 you addressed the Assistant Manager in a disrespectful and hostile manner and were otherwise insubordinate.

11. On or about March 29, 1983,

a) you refused a direct order from your supervisor to perform your regular assigned work duties;

b) you addressed him in a loud and hostile manner;

c) you physically assaulted him by shoving him with your hand; and

d) you were otherwise insubordinate.

12. On or about the following dates you were absent from your assigned area without permission or justification:

March 9, 10, 11, 14, 15, 16, 17, and 21, 1983

13. During the term of your employment and particularly during the first quarter of 1983 you performed your assigned work duties in an incompetent and unsatisfactory manner despite warnings and counselling by your supervisors in that;

a) you failed to complete past due tenant income reviews for 1982 and the first quarter of 1983 as instructed by your superiors, causing unnecessary delays in tenant rent adjustments; and

b) you made repeated errors in performing your tenant income review procedures, causing unnecessary delays in tenant rent adjustments.

A hearing of the charges was held on August 3, 1983, August 26, 1983, September 13, 1983, September 26, 1983, October 3, 1983, October 28, 1983, November 16, 1983 and December 20, 1983. At the hearings, the respondent was represented by Michael Shen, Attorney from the office of Shneyer and Shen. Jerome Weisberger, was the attorney for the Authority.

At the commencement of the August 26, 1983 hearing, the Authority, moved to amend charge ten by deleting the word "Assistant", so that the sentence would read Manager instead of Assistant Manager. The Authority's motion to amend charge ten was granted by the Trial Officer.

The respondent pleaded not guilty to all the charges and specifications.

During the November 11, 1983 hearing, the respondent's attorney Michael Shen, made application to withdraw from the case with the respondent's consent. At the end of the November 11, 1983 hearing Mr. Shen's motion to withdraw as Ms. Owens' attorney, was granted by the Trial Officer.

The respondent, Ms. Owens, was given a one month adjournment to obtain legal representation for the completion of her hearing. on the adjourned date, December 20, 1983, the respondent appeared without legal or union representation for her hearing, and testified on cross examination in her own behalf.

Charge 1

The Authority called Housing Manager, Morris Johnson, as its first witness. Mr. Johnson's testimony was in substance to the following effect: That on the morning of July 21, 1981, the respondent came to his office, and complained about a transfer request which she had made, and which had not been approved. She indicated that he was responsible for her transfer request not being approved, and stated that he (Mr. Johnson) was prejudiced against her color. She also stated to him something to the effect, that she was not used to working with niggers. The witness further testified that the respondent left his office and returned an hour later with a new transfer request which he signed. After signing the transfer request, the respondent again accused him of being prejudice, and refused to leave his office when he directed her to do so. The witness concluded his testimony by stating that the respondent, instead of leaving his office as directed, stood in his door-way so that he could not close the door. At which point, he left the office through another exit.

On, cross examination, the witness testified that he had prepared and given the respondent a written memo, dated July 22, 1981, relative to her insubordination and refusal to obey

an order. (see respondent' exhibit #1) Mr. Johnson further testified, that he had decided to have a local hearing relative to Ms. Owens' insubordination and refusal to obey an order, however, Ms. Owens was transferred shortly after the incident, and he gave consideration to a union request to withdraw the hearing on the grounds that the situation had been corrected, in the sense, that she was no longer at the project.

The witness concluded his testimony, on cross examination, by stating that local hearings are usually held within a month or so of the incident. Ms. Owens then stated that she was transferred to LaGuardia Houses on August 11, 1981.

The respondent testified in her own behalf and denied using abusive and insulting language to Mr. Johnson, and further denied the incident described by Mr. Johnson ever happened. Ms. Owens concluded her testimony by stating that she received the memorandum Mr. Johnson after she went to the Inspector General, and that she believed that he Johnson) Lied about the incident on, only to have negative data to place in her personnel folder.

It is the opinion of the undersigned, based on a plenary review of the credible and convincing testimony of Manager Morris Johnson, that the respondent did direct abusive and insulting language toward him on July 21, 1981, by stating that she was not use to working with niggers, and that she failed to obey Mr. Johnson's order to leave his office. The respondent's testimony denying the charges, and her explanation of Mr. Johnson's motive for giving her a written memo relative to the charges, were both unconvincing and unworthy of belief. Therefore, the undersigned finds the respondent guilty of Charge 1 specifications a and b.

Charges 2 and 3

Relative to Charges 2 and 3, the Authority called Assistant Manager, Lawrence Lefkowitz, as its second witness. Mr. Lefkowitz testified in substance to the following effect: That

on September 2, 1982, Ms. Zahl, a Housing Assistant, had to go into the field, as part of her duties, and that it is the policy of the Authority to have a Housing Assistant accompanied by another person, rather than having the Assistant go into the field alone. Therefore, he asked Ms. Owens to accompany Ms. Zahl to the field, which Ms. Zahl stated to him, Ms. Owens refused to do. When he asked Ms. Owens what the problem was, she started shouting at him in the hallway, while pointing her finger at him and complaining that she was not being treated fairly, and that she wouldn't stand for it. However, she (Ms. Owens) continued to point her finger in his face, yell, and followed him into the reception area. The witness further testified that he assigned someone else to accompany Ms. Zahl to the field, and that on the following day, September 3, 1982, he gave the respondent a memorandum regarding her behavior on September 2, 1982, and attempted to counsel her, which she refused. After Mr. Lefkowitz gave Ms. Owens the memo, (see Authority's exhibit #7), she entered his office and said to him, "you fucking stupid son of a bitch, you cross-eyed bastard, is your mother as ugly as you," and other comments of a similar nature.

on cross examination, Mr. Lefkowitz described the respondent as a person who is subject to wide mood swings and behavior, in the office. He added, that there were times when she acted very cooperative, and claimed she wished to do her work, and unfortunately, many other times when she was sarcastic, looked at her work as a joke, was abusive, insulting, unable to understand and follow instructions, and unable to cooperate in an office atmosphere. In concluding his testimony on cross examination, the witness admitted that his memo of September 3, 1982, did not indicate that he had directed the respondent to accompany Ms. Zahl to the field, (see Authority exhibit #7), and further stated, that he prepared a memo on September 7, 1982, for the Manager of LaGuardia Houses, (see Authority exhibit #14), relative to the respondent's use insulting and abusive language against him on September 3, 1992.

The respondent testified in her own behalf relative to Charges 2 and 3. She testified in substance to the following effect: That

she told Mr. Lefkowitz that Wendy Zahl had refused to go into the field with her on at least four different occasions, therefore, she objected to go out into the field with Ms. Zahl, and that she didn't refuse to go. The witness further stated, that she was never directed by Mr. Lefkowitz to accompany Ms. Zahl to the field, and that she was never insubordinate to Mr. Lefkowitz, nor did she ever yell, or point her finger at him. However, when asked if she ever raised her voice, the respondent said, yes. The respondent further testified that she never directed foul or abusive language at Mr. Lefkowitz when he attempted to counsel her, and that she never cursed at or called him bad names.

However, on cross examination, the respondent admitted calling Mr. Lefkowitz a "filthy dirty pig."

Housing Assistant Pinder, was called to testify as a character witness for the respondent. Mr. Pinder testified, that he worked with Ms. Owens, and that he never heard her swear, however, he has heard her yelling on one or two occasions, and that he probably heard the respondent yelling at the manager or assistant manager in the past.

It is the opinion of the undersigned, based on a plenary review of the credible and convincing testimony of Assistant Manager Lefkowitz, and an examination of the Authority's exhibit #7, that the respondent did disobey a direct order by her supervisor, on September 2, 1982, to accompany a coworker in the field, and was otherwise insubordinate. The respondent admitted during direct examination that she objected to accompanying Ms. Zahl to the field, but that she didn't refuse to accompany her. Ms. Owens also denied that she was given a direct order to accompany Ms. Zahl by Mr. Lefkowitz, and that she never yelled or pointed her finger at Mr. Lefkowitz. Therefore, the respondent is found guilty of Charges 2 and 3.

Charge 4

Relative to Charge 4, specifications a and b, the Authority called its third witness, Manager John Arakel. Mr. Arakel

testified in substance to the following effect: That on February 18, 1983, after attempting to counsel the respondent, the respondent returned to her office and turned her radio up to an unreasonably loud level. When he asked the respondent to turn her radio down, she refused, and said to him later in the day in his office, "I understand you don't like women," and "I want you to know, I am all woman." When he asked the respondent to leave his office she refused to do so.

On cross examination, Mr. Arakel stated that he believed the respondent turned her radio up loud to create a confrontation with him. He further admitted during cross examination, that the reason he didn't mention this incident in any of his memos, was due to an oversight on his part.

The respondent testified that there were occasions when Mr. Arakel asked her to turn down her radio because it was to Loud, and she turned the radio off, because she couldn't turn it down. The respondent denied directing insulting and offensive Language at Mr. Arakel, and was otherwise insubordinate.

The undersigned found Mr. Arakel's testimony to be credible and convincing relative to the respondent playing her radio loud, and refusing to turn it down, when directed to do so. However, the Authority failed to present sufficient and convincing testimony or evidence, to prove by a preponderance of the evidence, that the respondent directed insulting and offensive language to Mr. Arakel, and was otherwise insubordinate. The statements, "I understand that you don't like women," and "I want you to know, I am all woman," are not in and of themselves insulting and offensive language, especially if either one or both of these statements happen to be true. Therefore, it is the finding of the undersigned, that the respondent is guilty of specification 4(a), and not guilty of specification 4(b).

Charge 5

Assistant Manager Lefkowitz testified as follows relative to Charge 5: That at about twenty minutes past nine, March 2,

1983, he went to the respondent's office to ask her about an assignment that was overdue. The witness further testified that Ms. Owens responded to his inquiry, by saying to him, "Tough, get the fuck out of here."

However, the respondent: denied during her testimony that she used foul or abusive language to Mr. Lefkowitz on March 2, 1983, when he asked her if her dispossesses were ready, to which she replied in the affirmative.

It is the finding of the undersigned, after reviewing the testimony and evidence against the respondent relative to Charge 5, that the respondent did use abusive and foul language toward Mr. Lefkowitz, the Assistant Manager, on March 2, 1983, and was otherwise insubordinate towards him. This finding is based on the credible and convincing testimony of Mr. Lefkowitz, as oppose to the respondent's testimony, which consisted of an unconvincing denial of the charge. Additionally, the undersigned had to admonish the respondent for reading from prepared notes while testifying relative to Charge 5, which seriously detracted from the credibility of her testimony.

Therefore, the respondent is found guilty of Charge 5.

Charge 6

Relative to Charge 6, Assistant Manager Lefkowitz, testified as follows: That on March 10, 1983, he, and the Manager, Mr. Arakel, counselled the respondent relative to her income review backlog, and lack of cooperation. Additionally, when he attempted to give Ms. Owens a memorandum (see authority's exhibit #8) she became disrespectful made hand motions, like hurry-up signs, and made faces before she walked out on the counselling session, without signing for the March 10, 1983, memo.

The respondent testified in her own behalf relative to Charge 6, and denied that she was disrespectful, insubordinate, or that she walked out of the counselling session.

It is the finding of the undersigned, after reviewing all the testimony and evidence relative to Charge 6, that the

respondent is not guilty of being insubordinate, disrespectful, or that she walked out of the counselling session, on March 10, 1983.

Notwithstanding the fact that Mr. Lefkowitz gave credible and convincing testimony relative to Charge 6, it is the conclusion of the undersigned, that the Authority failed to prove by a preponderance of evidence, that the respondent was insubordinate and disrespectful toward her supervisors by the use of hand gestures and facial expressions.

The respondent is therefore found not guilty of Charge 6.

Charge 7

Relative to Charge 7, the manager, Mr. Arakel, testified in substance to the following effect: That on March 10, 1983, the respondent walked out of a counselling session before it was over, however, when Ms. Owens was directed to return to the counselling session, she did so, shouting hysterically, yelling, and accusing him, (Mr. Arakel), of harassing her.

She, (Ms. Owens), then approached him, (Mr. Arakel), and started shaking her finger in his face stating that "you are harassing me, and you are not going to get away with this," and punctuating her remarks by striking Mr. Arakel with her finger on his upper lip.

On cross examination, Mr. Arakel admitted that he wasn't hurt when the respondent pushed her finger into his lip, however, he did find Ms. Owens to be intimidating, because of her instability and her combative and aggressive behavior. Mr. Arakel concluded his cross examination, by stating that he referred the respondent for a psychiatric examination, because, he perceived her to be unstable. The respondent, however, was found by the authority's psychiatrist, not to be impaired mentally, and she was returned to work.

The respondent testified in her own behalf relative to Charge 7, in substance to the following effect: She denied that on March

10, 1983, or any other time, did she intentionally, or inadvertently raise, or shake her finger or otherwise strike Mr. Arakel on the lip, or be insubordinate to him. She did, however, admit that she was close enough to Mr. Arakel on March 10, 1983, to strike him. The respondent concluded her testimony by stating, that it was Mr. Arakel who pushed and shoved her from his office, after which she threatened to have him, (Mr. Arakel), arrested.

It is the finding of the undersigned, after reviewing and evaluating all the relevant evidence and testimony relative to Charge 7, that the respondent did intentionally and wilfully, physically menaced Mr. Arakel by striking him in his face with her finger, and being otherwise insubordinate.

The respondent is found guilty of Charge 7 primarily on the basis of the credible and convincing testimony of Mr. ArakeL, unconvincing denial of the respondent. Additionally, the respondent's testy combative, and sometimes unruly demeanor on the witness stand, served to underscore Mr. Arakel's testimony of the respondent's intimidating, aggressive, obstreperous, and insubordinate behavior as a housing assistant. Therefore, the respondent is found guilty of Charge 7.

Charge 8

Relative to Charge 8, (a and b), Assistant Manager Lefkowitz, testified in substance to the following effect: That on March 22, 1983, at about 9:20 a.m., he went to the respondent's office to inquire about her unauthorized absence the previous day. when he questioned the respondent, she began to scream at him, "you pig, you fucking pig, you son of a bitch, don't touch me." Ms. Owens then rose from her desk and started to follow him (Mr. Lefkowitz who immediately sought the assistance of the superintendent of the project, Mr. Flack. After Mr. Flack had quieted Ms. Owens down and left the area, Ms. Owens went into his (Mr. Lefkowitz's) office screaming, "you filthy pig, you molested me again, don't touch me." Mr. Lefkowitz, concluded his testimony relative to Charge 8, a and b, by stating that the

respondent called the housing police, who responded and were present when Ms. Owens served him with a summons for the mediation center. The witness emphatically stated, that he never struck, molested, or verbally abused the respondent at any time.

Mr. Arakel, testified on cross examination, that he had sent a memo to the chief manager, dated March 22, 1983, (see authority's exhibit #2) relative to Ms. Owens screaming at Mr. Lefkowitz and calling him a "filthy pig." Mr. Arakel also alleged, that the respondent falsely accused Mr. Lefkowitz of molesting her, and that he based that conclusion on the fact that he knew Ms. Owens to be a habitual liar.

The respondent testified in her own behalf relative to Charge 8, a and b, in substance to the following effect: That she was not loud and abusive to her assistant manager. She further testified, that on march 22, 1983, Mr. Lefkowitz came into her office, slammed her door and grabbed her by the arm, saying lets talk. The respondent became angry, and said to Mr. Lefkowitz in a loud voice, that he could speak to her without slamming the door or pulling on her arm. Ms. Owens concluded her testimony by admitting that she called mr. Lefkowitz a 'filthy pig,' because, he dropped cigarette ashes all over her desk, however, the respondent denied being insubordinate to Mr. Lefkowitz- Additionally, the respondent testified that she didn't protest to anyone relative to Mr. Lefkowitz's alleged harassment of her on March 22, 1983, however, she may have written a couple of memos. The respondent failed to indicate to whom the memos were written, or to offer the alleged memos as the respondent's exhibits.

It is the opinion of the undersigned, after reviewing all the testimony and evidence offered relative to Charge 8, specifications a and b, that the respondent was loud and abusive toward Mr. Lefkowitz on March 22, 1983, and did falsely accuse him of molesting her and was otherwise insubordinate. The respondent is found of Charge 8, specifications a and b, on the basis of the credible and convincing testimony of Mr. Lefkowitz, which was corroborated by Mr. Arakel, who testified that he

heard Ms. Owens screaming at Mr. Lefkowitz, calling him a "filthy pig," and falsely accusing Mr. Lefkowitz of molesting her, on March 22, 1983. (see authority's exhibit #2)

On the other hand, the respondent's testimony and denials were found by the undersigned, to be unconvincing and unworthy of belief. Additionally, the respondent admitted speaking in a loud voice to Mr. Lefkowitz because she was angry, and she also admitted calling him a "filthy pig," because, he dropped cigarette ashes on her desk.

Relative to specification 8b, it is the opinion and finding of the undersigned, based on the credible testimony of both Mr. Lefkowitz and Mr. Arakel, that Ms. Owens falsely accused Mr. Lefkowitz of molesting her as means of defending herself against charges of insubordination, and countering criticism for her disruptive and outrageous behavior that was brought to the attention of Mr. Flack, superintendent of LaGuardia Houses.

Therefore, the undersigned finds the respondent guilty of Charge 8, specifications a and b.

Charge 9

Relative to Charge 9, Mr. Lefkowitz testified in substance to the following effect: That on March 23, 1983, at about 3:15 p.m., he went into the respondent's office to discuss a tenant's account with her, when the respondent began yelling, "you filthy pig, you fucking pig, don't touch me again," and moved close to his face pointing her finger without touching him.

Mr. Lefkowitz concluded his testimony by stating that there were no witnesses to the incident that he was aware of.

The respondent testified, and denied being loud and abusive and having directed foul language at the assistant manager, on March 23, 1983.

It is the finding of the undersigned, after a plenary review of all the relevant testimony and evidence, that the respondent

is guilty of Charge 9. The respondent's guilt was established by the credible and convincing testimony of Mr. Lefkowitz. On the other hand, the undersigned found the respondent's testimony and denial of the charge, unconvincing and not believable.

Therefore, the undersigned finds the respondent guilty of Charge 9.

Charge 10

Relative to Charge 10, Mr. Arakel, the manager, testified in substance to the following effect: That on March 28, 1983, the respondent came to work late, at about 12:53 p.m., without calling him or the office. When he asked the respondent why she was Late for work, she replied that it was none of his business, and refused to tell him. When he informed Ms. Owens that she could not remain in the office "outside of his supervision," she failed to answer After he Left the respondent's office, she came to his office and said to him, "and that is another nail in your coffin."

On cross examination, Mr. Arakel admitted that he did not prepare a counselling memo for the respondent relative to her lateness, on March 28, 1983, and the disrespectful remarks she made to him. The reason given by the witness for not preparing a memo relative to the incident on March 28, 1983, was that there were so many incidents at the time, that he didn't have the time to sit down and write a memo on every incident.

The respondent testified in her own behalf relative to Charge 10, in substance to the following effect: That she did punch in for work on March 23., 1983, at about 12:30 p.m. or 1:00 p.m., because she was in court regarding a complaint that she had made against Mr. Lefkowitz. Ms. Owens also admitted that she did not request time off to go to court according to the Authority's established procedures. The respondent concluded her testimony by denying that she was disrespectful or insubordinate to Mr. Arakel on March 28, 1983.

It is the finding of the undersigned, after hearing and reviewing the credible and convincing testimony of Mr. Arakel, that on March 29, 1983, the respondent addressed Mr. Arakel in a disrespectful and hostile manner and was otherwise insubordinate.

On the other hand, the undersigned found the respondent's denial of the charge, unconvincing, and her contentious demeanor on the witness stand to be corroborative of Mr. Arakel's testimony relative to Charge 10. The respondent also displayed an apparent hostile and disrespectful attitude toward Mr. Arakel throughout her testimony.

Therefore, the undersigned finds the respondent guilty of Charge 10.

Charge 11

Relative to Charge 11, specifications a, b, c, and d, Mr. Arakel testified in substance to the following effect: That on March 29, 1983 Ms. Owens came to work at 1:17 p.m., and when he asked her where she was, she responded, "I find you ugly, I find you ugly and obnoxious." When he continued to question her about her whereabouts, she went into Mr. Meyer's office without answering him. After following her into Meyer's office and telling her that she can't come in and do nothing, that she had to do some work, especially what he had told her to do. She then got up from the desk, and shoved him as she left the office, and went downstairs to the maintenance area, where she lingered with the caretakers.

On cross examination, Mr. Arakel repeated his direct testimony relative to the incident with the respondent, on March 29, 1983.

The respondent testified in her own behalf relative to Charge 11 specifications a, b, c, and d, in substance to the following that on March 29, 1983, when she punched in for work, Mr. Arakel and Lefkowitz came to her office, and asked her where she had been all. morning. She replied that she was in court,

and that she wasn't going to take all their abuse, so she went into Mr. Meyer's office.

She admitted that she raised her voice in anger to Mr. Arakel, however, she denied shoving him, being insubordinate, or calling him ugly and obnoxious.

It is the finding of the undersigned, after hearing and reviewing the credible and convincing testimony of the Manager, Mr. Arakel, that the respondent, a) did refuse a direct order from him to perform her regular assigned duties, b) that she did address him (Mr. Arakel) in a loud and hostile manner, by her own admission, c) that she physically shoved Mr. Arakel with her hand, and d) that she was otherwise insubordinate.

The respondent's denial of Charge 11, specifications a, b, c, and d, were found by the undersigned to be unconvincing and unworthy of belief.

The respondent exhibited throughout her testimony, a combative, contemptible, and disrespectful attitude toward authority in general, and authority figures in particular.

Therefore, the undersigned finds the respondent guilty of Charge 11, specifications a thru d.

Charge 12

Relative to Charge 12, Mr. Arakel, the manager, testified in substance to the following effect: That on March 9, 1983, the respondent was absent without leave from work, and gave no explanation. on March 10, 1983, the respondent punched out at 12:20 p.m., without permission, after walking out of a counselling session. March 11, 14, 15 and 21, 1983, the respondent was absent without leave from work. on March 16, 1983, the respondent punched out at 1:41 p.m., and was docked 3 1/2 hours. on March 17, 1983, the respondent came to work at 12:57 p,m., instead of 9:00 a.m. (see authority's exhibit 15)

On cross examination, Mr. Arakel testified that the apparent erasures of the letter "S" on the respondent's time cards for the dates, march 9, 11, 14, 15, and 21, 1983, were made at his instructions by his secretary, who replaced the letter "S" with the letter "P." Mr. Arakel's explanation for the change, was that his secretary routinely places an "S", for sick, when an employee is absent from work without calling the office, however, he directed the change to "P", indicating personal leave not sick leave. (see authority's exhibit 15)

The respondent testified relative to Charge 12, in her own behalf in substance to the following effect: That on March 9, 1983, she called in sick, but she couldn't remember who she spoke to, however, she believes it was Mr. Arakel's secretary.

On March 10, 1983, she punched out early after telling Mr. Arakel that she wasn't feeling well. The respondent submitted a doctor's note for the days, March 10 thru 15, 1983, and a second note for March 18, 1983, which stated, "Treated on March 18, 1983, in my office." (see respondent's exhibit 6) The respondent further submitted a Request to appear before the Dispute Resolution Center, March 21 1983, for Mr Arakel, as the reason for her absence on that date. (see respondent's exhibit 7) The respondent further testified that she probably clocked out early on March 16, 1983, because she generally, felt ill after following an episode with Mr. Arakel or Mr. Lefkowitz. Relating to March 17, 1983, the respondent concluded her testimony by stating that she probably had to go to court for either Mr. Arakel or Mr. Lefkowitz during the morning, however, she could not find any papers to substantiate that belief.

It is the finding of the undersigned, after reviewing the testimony and evidence submitted relative to the respondent being absent from work without permission and justification on March 9, 10, 11, 14, 15, 16, 17, and 21, 1983, that the respondent's doctor's note (see respondent's exhibit 6) was an acceptable justification for her March 11, 14, and 15th absences, in accordance with the authority's rules and regulations.

However, it is the conclusion of the undersigned, that the respondent was absent without leave on March 9, and 21, all day, March 10 and 16, 1983, the respondent punched out early without authority or permission, and on March 17, 1983, the respondent came to work in the afternoon without prior permission or authority.

The respondent testified, that on March 9, 1983, she stayed home, because she was sick, and that she notified her job by calling and speaking to Mr. Arakel's secretary. Mr. Arakel testified on the other hand, that Ms Owens did not call him or his secretary relative to her absence on March 9, 1983. It is Mr. Arakel's testimony that the undersigned finds to be credible on this point as oppose to the respondent's testimony. Notwithstanding, the fact that Mr. Arakel admitted that he had his secretary erase the letter "S" and replace it with the letter "P' for (personal day) on the respondent's time card for March 9, 1983.

Relative to March 10, 1983, the respondent admitted that she punched out early from work, because she wasn't feeling well, without notifying her supervisor or obtaining his prior consent or permission in accordance with the authority's regulations. Relative to March 16, 1983, the respondent also admitted that she would leave work early whenever she had an episode with either Mr. Arakel or Mr. Lefkowitz, and that March 16, might have been one of the days. Relative to March 17, 1983, when the respondent clocked in for work late, and March 21, 1983, when the respondent was absent the entire day, the respondent's explanation was that she had to appear in court. However, the respondent admitted that she failed to get prior approval or permission to be late on March 17, or absent on March 21, 1983, according to the Authority's rules and regulations.

Therefore, the respondent is found guilty, in part, of Charge 12, for being absent without permission or justification on March 9, and 21, 1983, and for leaving work early without permission or justification on March 10, and 16, 1983. On March 17, 1983, respondent is also found guilty, for coming to work late, without obtaining prior permission or authority.

Charge 13

Relative to Charge 13, specifications a and b, Mr. Lefkowitz testified in substance to the following effect: That as a housing assistant, the respondent is responsible for reviewing tenant's incomes, which is the basis for setting tenant's rents. The respondent was assigned two buildings as her area of responsibility for conducting annual tenant income reviews which was scheduled on a quarterly basis. (see authority's exhibit 9)

Mr. Lefkowitz further testified, that his manager, Mr. Arakel, counselled the entire managerial staff, including the respondent, relative to procedures to follow for the eradication of the backlog of tenant reviews. (see authority's exhibit 10) However, despite counselling sessions with the respondent relative to her backlog of income reviews, she failed to complete 41 out of a total of 60 reviews for the first quarter of 1983, prior to leaving LaGuardia Houses, March 30, 1983. (see authority's exhibit 11)

Additionally, the respondent had 49 incomplete reviews from '82, plus 41 incomplete for '83, for a total of 90 incomplete income reviews. The witness concluded his testimony by stating, that due to the respondent's failure to complete her income reviews on time, the authority lost approximately $2,201.00 in revenue from uncollected rents, and that the respondent's failure to complete her income reviews on time, was also partly due to errors that she consistently made such as e.g., a) non-fixed employment projected as fixed employment b) improper verification of family members entering the household, c) tenant's information was not verified and placed in tenant's interview record, d) social security recipients and their incomes were projected incorrectly, e) Federal exemptions were often incorrectly applied, and f) retroactive credits and charges, were often incorrectly applied.

On cross examination, Mr. Lefkowitz testified that he attributed part of her failure to complete her income reviews on time, to her refusal to cooperate with Mr. Arakel and himself.

However, when other housing assistants fell behind with their income reviews, they were generally able to catch up with their work when they cooperated with management.

Mr. Lefkowitz rated the respondent as the poorest performer out of the four housing assistants who were responsible for income reviews Manager, Mr. Arakel, testified relative to Charge 13, specifications a and b, in substance to the following effect: That the respondent's income reviews were her "greatest liability and backlog." The authority also called Assistant Manager, Stephen Freiband, as a rebuttal witness. Mr. Freiband, who works with the HUD Acquired Properties, also wrote the authority's manual on income reviews, testified in substance to the following effect: That the respondent worked for him, at the Wagner Houses, in 1981. That he found the respondent's work unsatisfactory relative to income reviews, because the work was not completed on time, and she had a fairly high percentage of errors, at least 50%. The witness concluded his testimony by stating, that even after additional training, the respondent's performance was sporadic, but for the most part, her performance was unsatisfactory.

On cross examination, Mr. Freiband testified, that out five housing assistants, the respondent was the only unsatisfactory performer relative to income reviews. The witness concluded his testimony by stating, that the respondent's income reviews were unsatisfactory, and that he didn't recall paying the respondent a compliment, however, it is possible that he did pay her a compliment relative to other aspects of her work.

Prior to calling the respondent to testify in her own behalf relative to Charge 13, specifications a and b, Mr. Weisberger and Mr. Shen, stipulated for the record, the number of late tenant review files for each of the four quarters of 1982, and the first quarter of 1983, out of the total number of cases assigned for review to the four housing assistants, at LaGuardia Houses.

The stipulation is as follows:

	Year 1982			Year 1983	
HA	1st Qrt.	2nd Qrt.	3rd Qrt.	4th Qrt.	1st Qrt.
Owens	21LR	26LR	11LR	34LR	41LR
	60tot. 35% LR	70tot. 37% LR	60tot. 18% LR	184tot. 29% LR	60tot. 68% 11,.'
Zahl	40LR	77LR	0	36LR	23LR
	124tot. 32% LR	124tot. 62% LR	0	123tot. 29% LR	124tot. 19% LR
Meyer	0	57LR	0	0 -	182LR
	0	108tot. 53% LR	0	0	246tot. 66% LR
Pinder	58LR	37LR	0	0	103LR
	247tot. 23% LR	120tot. 31% LR	0	0	247tot. 42% LR

LR - Late Report

The Authority submitted the following unstipulated to figures, relative to the tenant reviews that remained undone as of March 30, 1983, for the calendar year 1982, and the first quarter of 1983 as follows:

As of March 30, 1983

Zahl - 6 undone reports out of 367 - '82 - 23 undone out of 124 - '83

Pinder - 2 undone reports out of 367 - '82 - 102 undone out of 247 - '83

Meyer - 8 undone reports out of 382 - '82 - no incompletes in '83

Owens - 49 undone reports out of 374 - '82 - 41 undone out of 60 - '83

The respondent's testimony relative to Charge 13, was in substance to the following effect: That she probably completed more than half of her income reviews for the 1st quarter of '83 before she left LaGuardia Houses, March 30, 1983. The respondent also stated, that she couldn't complete more income reviews before March 30, 1983, because she had to request, and wait for information. She further alleged, that she was told by her supervisor, not to send for any information prior to February 15, 1983. The respondent concluded her testimony, by denying that she was incompetent, or that she failed to complete past due tenant income reviews for 1982, and the 1st quarter of 1983.

It is the finding of the undersigned, after reviewing all the testimony and evidence relative to Charge 13, specifications (a) and (b), that the respondent did fail to complete past due tenant income reviews for 1982, and the first quarter of 1983, and that the respondent made repeated errors in preparing her tenant income review reports.

The Hearing Officer's finding is based on the credible and convincing testimony of Mr. Lefkowitz. Mr. Lefkowitz, the respondent's immediate supervisor, testified that on several occasions he attempted to counsel the respondent relative to the proper and timely preparation of tenant income reviews, (see authority's exhibits 3, 4, 14 and 16) to no avail. There was also convincing and persuasive testimony by Mr. Freiband, who stated that the respondent worked for him at the Wagner Houses, in 1981, and that he found her work relative to income reviews, to be unsatisfactory, because the income reviews were often submitted late, by the respondent, with a fifty percent error rate. It should be noted, that Mr. Freiband was asked to testify only after the respondent gave testimony that he (Mr. Freiband), had praised her work in the area of income reviews.

Additionally, an inspection of the stipulated statistics of the completion rates of all the housing assistants assigned to the LaGuardia Houses during 1982 and the first three months of 1983, would appear to indicate that the respondent's completion rate of income reviews was not substantially lower than her colleagues.

However, an examination of the authority's figures relative to the outstanding income reviews for all LaGuardia Housing Assistants, as of March 30, 1983, clearly indicate that the respondent had the largest number of '82 and '83 incomplete tenant income review reports. The credible and convincing testimony of Mr. Lefkowitz attributed the respondent's substantial number of incomplete income reviews to the respondent's opposition and resistance to any and all counselling. However, Mr. Lefkowitz testified that the other housing assistants who had income review backlogs were amenable to counselling.

(see authority exhibit 10)

On the other hand, the respondent's testimony and denials that she failed to complete her tenant income reviews in timely fashion, and that she didn't make repeated errors, was found to be unworthy of belief and unconvincing by the undersigned.

Therefore, the undersigned finds the respondent guilty of Charge 13, specifications a and b.

Summary

The respondent was found guilty after a plenary review of all the testimony and evidence, of the following charges: Charge 1, 2, 3, 4a, 5, 7, 8a, and b, 9, 10, Ila thru d, 12, dates 3/9, 3/10, 3/16, 3/17, and 3/21, and 13a and b, and not guilty of Charge 4b, 6, 12, dates 3/11, 14, and 15, 1983.

The respondent was appointed as a housing assistant, July 1978, she is 54 years old. Ms. Owens was the subject of one prior disciplinary proceeding for using abusive language to her

supervisor, and for using abusive and threatening language to her supervisor, on March 11, 1981. She was found guilty of both charges and fined $100.00

It is the finding and opinion of the undersigned, that the respondent engaged in disorderly and disruptive behavior when assigned to the LaGuardia Houses, and was insubordinate, disrespectful, threatening, and abusive to her supervisors, to the extent that the day to day operations of LaGuardia Houses were adversely affected. The respondent's obstreperous, hostile, aggressive behavior and attitude, were often displayed during the hearing. Ms. Owens demonstrated throughout the hearings, her contempt for authority, and for complying with the rules and procedures of the Authority.

The respondent's bad temper, abusive and threatening language, and do as I please attitude, if permitted to go unchecked, will cause irreparable harm and damage for the authority, its employees and tenants. Therefore, it is the recommendation of the undersigned, that the respondent be dismissed as a Housing Assistant, as a just and proper sanction for being found guilty of the herein serious charges.

Respectfully,

JONATHAN E. RAINES

Trial Officer

Opinion of Supreme Court, New York County

(February 25, 1985)

SUPREME COURT NEW YORK COUNTY
SPECIAL TERM PART I

----------x

Application of CATHERINE OWENS,

Petitioner,

For a Judgment pursuant to Article 78 of the C.P.L.R.

INDEX NO.

- against -

22266/84

NEW YORK CITY HOUSING AUTHORITY and THE CITY OF NEW YORK,

#233 of 12/27/84

Respondents.

----------x

IRA GAMMERMAN, J.:

This is an application by petitioner pursuant to CPLR Article 78 seeking a judgment annulling respondent New York City Housing Authority's action dismissing her from the position of Housing Assistant. Co-respondent, the City of New York cross moves pursuant to CPLR 7804(f) for a judgment dismissing the petition on the ground that it fails to state a cause of action.

Petitioner challenges her dismissal alleging primarily that the Trial Officer violated lawful procedure and also upon the ground that the penalty imposed was grossly excessive.

It is undisputed that in August 1983 petitioner was formally charged by respondent Housing Authority with thirteen separate violations and twenty-seven separate specifications involving misconduct and incompetency allegedly occurring during the

period July 21, 1981 to March 29, 1983. A hearing was conducted pursuant to Civil Service Law §75(2) and continued over eight sessions producing approximately one thousand pages of testimony. At that hearing, petitioner was represented by counsel, had the opportunity to subpoena witnesses in her behalf, cross examine adverse witnesses and examine her personnel record.

In his sixteen page decision the Trial Officer found petitioner guilty of substantially all of the charges and specifications and recommended dismissal. The Trial Officer's report is extensively detailed and recounts testimony of certain key witnesses and the reasons for his ultimate findings of guilt or non-guilt. In summing up his report the Trial Officer stated:

> The respondent was appointed as a housing assistant, July 1978, she is 54 years old. Ms. Owens was the subject of one prior disciplinary proceeding for using abusive language to her supervisor, and for using abusive and threatening language to her supervisor, on March 11, 1981. She was found guilty of both charges and fined $100.00.
>
> It is the finding and opinion of the undersigned, that the respondent engaged in disorderly and disruptive behavior when assigned to the LaGuardia Houses, and was insubordinate, disrespectful, threatening, and abusive to her supervisors, to the extent that the day to day operations of LaGuardia Houses were adversely affected. The respondent's obstreperous, hostile, aggressive behavior and attitude, were, often displayed during the hearing. Ms. Owens demonstrated throughout the hearings, her contempt for authority, and for complying with the rules and procedures of the authority.
>
> The respondent's bad temper, abusive and threatening language, and do as I please attitude, if permitted to go unchecked, will cause irreparable harm and

> damage for the authority, its employees and tenants. Therefore, it is the recommendation of the undersigned, that the respondent be dismissed as a Housing Assistant, as a just and proper sanction for being found guilty of the herein serious charges.

Petitioner objects to the Trial Officer's report by contending that he based his recommendation concerning the penalty on the employee's past employment record. However, the authority cited by petitioner, Matter *of Bigelow v. The Board of Trustees*, 63 NY2d 470, is inapposite. In *Bigelow* the employee charged with misconduct was not given an opportunity to offer ameliorating information regarding prior disciplinary proceedings. Here, petitioner had the opportunity to review her personnel folder. Her personnel file contained a letter from petitioner dated February 5, 1981 in which she fully discusses her position concerning the prior incidents. Moreover, on December 18, 1984, respondent's Chief of Litigation offered petitioner an opportunity to submit any supplemental information regarding the disciplinary proceedings referred to by the Trial officer. Respondent further agreed to voluntarily remand the matter if that information was not duplicative of matter already contained in the personnel file. Petitioner refused this offer.

Upon a reading of the record and the Trial Officer's thorough and complete recitation of facts and testimony the court finds that petitioner was accorded due process and fundamental fairness.

The transcript does not support petitioner's allegation that the Trial Officer was biased and denied petitioner a fair hearing. On the contrary, it reveals a long, painstaking hearing conducted by a thorough and patient hearing officer.

Petitioner's contention that the penalty is disproportionate to the offense is also without merit. It is well established law that in fashioning the punishment to be imposed, the commissioner had the right to examine the petitioner's entire record (*Baj v. Murphy*, NY2d 762; *In re, Rannocher v. McGuire*, 85

AD2d 521). In addition, where the finding of guilt is confirmed and punishment has been imposed, the test is whether such punishment is "so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness." *(Matter of Pell v. Board of Education*, 34 NY2d 222).

Petitioner was found guilty of gross insubordination to three supervisors covering a twenty month period despite numerous warnings and attempts at counselling. The gravity of her offense and the hearing officer's finding of guilt are supported by overwhelming evidence which is not challenged here. The penalty, which was properly imposed subsequent to the findings of guilt cannot be said to be so disproportionate so as to shock one's sense of fairness.

Accordingly, the application is denied and the petition is dismissed.

The cross motion by respondent The City of New York is, therefore, moot. Had the petition not been dismissed on the merits, the Court would have granted the cross motion. The New York City Housing Authority is "constituted and declared to be a body corporate and politic" entirely separate from the City of New York (Public Housing Law §401). The City neither hired, disciplined or terminated petitioner's employment. Thus, as a separate independent entity, the City of New York was not a proper party respondent here.

The foregoing decision constitutes the judgment of the Court.

DATED: February 25, 1985.

J. S. C.

Except from Catherine Owens's EEOC

"Charge of Discrimination" filed and subscribed to

on June 27, 1983

(Caption ommitted)

CAUSE OF DISCRIMINATION BASED ON MY (Check appropriate box(es))

_x_ Race __ Color _x_ Sex _x_ Religion __ National Origin

_x_ Other

Black Female Christian Age

DATE MOST RECENT OR CONTINUING DISCRIMINATION TOOK PLACE (Month, day and year)

June 14, 1983

THE PARTICULARS ARE: DATE OF BIRTH: December 19, 1929

I began working for the Housing Authority in January 1977, and am a Housing Assistant currently assigned to Carver Houses. I have been harassed by the Manager, *John Arakal*, and the Assistant Manager, Larry Lefkowitz, of La Guardia Houses where I worked for almost two (2) years; I was suspended without pay on March 30, 1983; I was required to see a psychiatrist. I was re-assigned on May 9, 1983 to an inconvenient work location, the Carver Houses; I am being denied a transfer to one of two open positions; and, charges have been brought against me seeking my dismissal.

The charges against me, dated June 14, 1983, concern "incompetency and misconduct."

I believe that I have been discriminated against because of my sex (female) and/or religion (Christian) and/or my age (53) and/or race (Black), for:

1. I was harassed by Mr. Lefkowitz (Jewish, male) and appealed for assistance through channels to men who are also Jewish.

2. Two (2) Jewish Housing Assistants in the LaGuardia Houses who are younger than I were not harassed or had charges brought against them.

3. I was the oldest person in the office of the LaGuardia Houses.

4. I am an extra person at the Carver Houses with little work and no tenant contact.

5. I have applied for an open position in Seward Park Houses and for one in the central office. Either of these positions would be more convenient for me and would be a permanent, not an extra position.

Letter from Cathrene Owens to EEOC

March 14, 1984 (HAND DELIVERED)

145 East 39th Street
New York, New York 10016

Equal Employment Opportunity, Commission
New York District Office
90 Church Street - Room 1501
New York, New York 10007

Attention: Mr. Jose Jeremias Dennis
Equal Opportunity Specialist

Re: #021-83-3282
Catherine Owens

Dear Mr. Dennis:

This letter is in reference to your certified letter (#P 705 637 872) received March 10th and our telephone conversations of March 5th and March 14th.

As I informed you, Mr. Richard Turer did call me last fall However, additional information was not requested. He wanted the name of my lawyer. Since speaking to you I have spoken to Mr. Shen Esq., Neither was any additional information requested from Mr. Shen. Since that time I have not heard from the Equal Opportunity Commission since last Fall. We would like to cooperate with you as best we can, however, you have not been explicit in your requirements.

In your letter you have requested that I submit documents. I don't know which documents you refer to. I have been employed by Housing now going on eight years and any documentation you wish to acquire, (re: time and attendance, work performance, transfer request etc.) are available to you through the personnel department. My attorney did advise that there were Internal Audit and Reporting System and Applicant Flow Records re: hiring, transfers, and promotions of employees. Perhaps these are the records you need.

You mentioned Wagner Houses in our conversation. I am therefore attaching a copy of pages 31 and 32 regarding "Transfers and filling of job Vacancies" for Housing Assistants, Assistant

Managers etc. Even though I had worked at this location for the required time (15 months) before requesting a transfer, Mr. Henry Bresky, head of District North in violation of contractual agreement pertaining to employee transfers, would not allow me to transfer, even though I had made at least five requests for posted job openings, had an interview and was told that I would be accepted at another location. At the same time approximately special arrangements were made to have Mr. Stephen Freiband transfer out of Wagner Houses even though he had not put the minimum of (30 months) required by the contractual agreement by Mr. Bresky and Rita Coss, the person handling the transfers. Even after I moved to Staten Island and carfare was $4.50 per day ($22.30 per week), I still not allowed to transfer and was there for almost three years. As retaliation for my requests for transfers I was written up. Attached also is a copy of the Housing Workers Rank & File newsletter which describes quite accurately how subordinates are dealt with by non-caring, Insensitive and very often unscrupulous supervisors. My requests for transfers are a matter of record, You should have no problem in getting these documents.

I have been assigned to work at Carver Houses and I've been there for almost a year (as an excess), temporary assignment. While here I've put in for four such posted vacancies but I am still here as 'excess' even though I have seniority and experience and known to be quite capable and competent.

I was considered one of the two best Housing Assistants at LaGuardia Houses, I arrived there during the middle of a yearly quarter in which annual reviews were to be completed. I completed all the work in half the allotted time. All of the work I had to do was completed on time. I was asked to complete annual reviews (annual reviews are yearly income checks for project tenants) that had not been done for two, three and four years, as far back as 1978, (I arrived at LaGuardia in August of 1981). I completed all of this work. Two of the Housing Assistants there were having difficulty, doing their work. Whenever they asked, I was always cooperative and helpful. On H.A. was unable to do his work, As requested, I taught another employee to do the annual reviews and showed her how easy

it would be to complete the senior citizens building (about 250 tenants). She received a commendation for doing the work that the H.A was unable to do. However, I didn't think it was the HA's fault that he couldn't do the work. It appeared that he had not had that kind of experience and his supervisor the Assistant Manager was almost never available to help him. I managed to do the best I could under the circumstances, and got a lot of the work completed. One of the other HA's had a similar problem and whenever she asked me I tried to help out. All matters pertaining to tenant's annual reviews are a matter of record, and you should find these easy to obtain, (I have my own records, if you wish to see them). Even though the annual review were completed by the Housing Assistants, the rent changes could not be processed until they were checked by the Assistant Manager. These tenants records would remain in his office (as many as 100 or more folders) for months, unchecked by him, resulting in revenue losses for the agency. We (Housing Assistants) took this matter up with the District office, but nothing was ever done about it.

I had no choice but to report the problem I experienced with the Asst. Manager and Manager to EEOC on June 14,1983 because it became apparent that the matter would not be solved internally. That same week after I had gone to EEOC charges were taken out against me accusing me of being incompetent and also accusations that I was guilty of misconduct. I am quite capable and competent and happen to be very good at my job. I have never misconducted myself. The entire staff was outraged at the misconduct and negative behavior of the Am and Manager which continued for approximately two months. I was urged to call the union, call the District, the police, etc. (Human Rights). All of which I did.

Please advise regard to this response to your request.

cc: M. Shenn Esq. Miss Catherine Owens
K.W. Lindsley, Gen. Counsel
Director Eduardo Mercado, EEOC

Excerpt from the Housing Authority's Brief to the
United States Court of Appeals for
the Second Circuit

POINT III

THE DISTRICT COURT CORRECTLY DISMISSED PLAINTIFF'S RETALIATION CLAIM BECAUSE IT WAS NOT REASONABLY RELATED TO HER EEOC FILING; FURTHER, THE HOUSING AUTHORITY'S FAILURE TO PLEA BARGAIN THE DISCIPLINARY CHARGES DID NOT CONSTITUTE RETALIATION.

After an analysis of the facts and circumstances of this case, the District Court found that plaintiff did not present her retaliation claim to the EEOC for investigation and conciliation and that this retaliation claim could not reasonably be expected to grow out of the charges of race, sex, religion and age that plaintiff filed with the EEOC. Consequently, following controlling precedent in this Circuit, the District Court dismissed plaintiff's retaliation claim.

The District Court did not, however, reach the question whether the Housing Authority's purported failure to plea bargain plaintiff's disciplinary charges constituted an adverse employment action. Nonetheless, the Housing Authority contends not only that plaintiff's retaliation charge was unrelated to the charges she did bring before the EEOC but also that it does not constitute an adverse employment action under either Title VII or the ADEA. The Housing Authority's alleged failure to plea bargain plaintiff's disciplinary charges does not constitute an adverse employment action because this "failure" merely served to provide plaintiff with a due process hearing. Accordingly, even if the District Court had not dismissed this claim, plaintiff could not have made out a *prima facie* case of retaliation because there was no adverse employment action.

A. *The District Court Properly Concluded That The Defendants' Alleged Retaliation Was Not Reasonably Related To The Discrimination Charge Plaintiff Presented To The EEOC.*

In general, an employee may not file an action in federal court alleging a discriminatory employment practice, such as retaliation for engaging in protected activities, unless a charge has first been filed with the EEOC. 42 U.S.C. § 2000e-5(a) (Title VII); 29 U.S.C. § 626(d) (ADEA); *O'Malley v. GTE Serv. Corp.*, 758 F.2d 818 (2d Cir. 1985); *Bradley v. Consolidated Edison Co. of New York, Inc.*, 657 F. Supp. 197, 202 (S.D.N.Y. 1987). *Meyer v. MacMillan Publishing Co.*, 85 F.R.D. 149, 25 Fair Empl. Prac. Cas. (BNA) 1003 (S.D.N.Y. 1980). The reason behind this exhaustion requirement is to promote the resolution of employment disputes through conciliation rather than litigation. *Weise v. Syracuse University*, 522 F.2d 397, 412 (2d Cir. 1975). As the Fifth Circuit has explained:

> Once a charge has been filed, the [EEOC] carries out its investigatory function and attempts to obtain voluntary compliance with the law. Only if the EEOC *fails* to achieve voluntary compliance will the matter ever become the subject of court action.

Sanchez v. Standard Brands, Inc., 431 F.2d 455, 466 (5th Cir. 1970) (emphasis in original).

Stated otherwise, "the purpose of the exhaustion requirement . . . is to give the administrative agency the opportunity to investigate, mediate, and take remedial action" with respect to a charge of discriminatory conduct. *Stewart v. United States Immigration and Naturalization Service*, 762 F.2d 193, 198 (2d Cir. 1988). *Miller v. International Tel. and Tel. Corp.*, 755 F.2d 20, 23 (2d Cir.), *cert. denied*, 474 U.S. 851 (1985) ("No action based on a claim of . . . discrimination may be brought in federal court unless the claim was properly raised with the EEOC. . . ."). *See also Bickley v. University of Maryland*, 527 F. Supp. 174, 179 (D.Md. 1981) ("[H]ad the plaintiff timely

filed her retaliation charge rather than waiting approximately two years, there would have been an opportunity for administrative conciliation while the alleged discrimination was still fresh."). The purpose of filing a charge with the EEOC is to give the employer notice and a fair opportunity to resolve the allegations against it, in order to avoid federal litigation. *Cosgrove v. Sears, Roebuck and Co.*, No. 81 Civ. 3482 (CSH) (S.D.N.Y. July 27, 1990) (LEXIS, Genfed library, Dist file, No. 9337) (Haight, J.).

The Second Circuit and its district courts have crafted an exception to the requirement that a charge of employment discrimination must first be brought before the EEOC. The exception applies when a plaintiff can demonstrate that the unfiled discrimination charge is reasonably related to the charges that were filed with the EEOC. *Kirkland v. Buffalo Bd. of Education*, 622 F.2d 1066, 1068 (2d Cir. 1980). The "reasonably related" exception employed in this Circuit removes any unnecessary impediments in the path of an aggrieved litigant while doing no harm to the legislative policy of investigation and conciliation because the EEOC's investigation and conciliation of the original charges reasonably may be expected to have encompassed the unfiled claim. This approach of looking to what the EEOC investigated and could have investigated

> avoids the unfortunate result of dismissing a claim of retaliatory termination when such claim may have been the subject of a full investigation by the administrative agency, and of negotiation by the parties [and also] avoids the blanket rule . . . that a claim of [discrimination] is *as a matter of law* 'reasonably related to' a claim of [retaliation], and therefore assertion of the former will *always* satisfy the exhaustion requirement as to the latter.

Desai v. Tompkins County Trust Co., 31 Fair Empl. Prac. Cas. (BNA) 40, 43 (N.D.N.Y. 1983) (emphasis added). *See also Bennett v. New York City Dep't of Corrections*, 705 F. Supp. 979, 982 (S.D.N.Y. 1989).

However, to effectuate the legislative policy, the unfiled discrimination charge must have been investigated by the EEOC in the course of investigating the original charges or reasonably should have been expected to be encompassed by the charges that were filed. *Stewart*, 762 F.2d at 198; *Almendral v. New York State Office of Mental Health*, 743 F.2d 963, 967 (2d Cir. 1984).

Plaintiff labels the Housing Authority's failure to have plea bargained her disciplinary charges as "retaliation" for her EEOC filing and, without any explanation or analysis, concludes that such a retaliation claim is "reasonably related" to her original EEOC charges. However, because the EEOC could not reasonably have been expected to investigate this unique retaliation charge against a Housing Authority attorney as an outgrowth of its investigation into the charge of discrimination based on race, sex, religion, and age and lodged against plaintiff's project supervisors, Arakel and Lefkowitz, the District Court properly dismissed it.

Nonetheless, plaintiff insists that the District Court erred because, she says, *any* act of retaliation taken as a consequence of charges having been filed with the EEOC - no matter how unusual and no matter what the circumstances - is, by definition, "reasonably related" to the charge filed.

Contrary to plaintiff's *per se* rule, the courts in this Circuit realize that "reasonable relationship" does not mean "any" relationship, but rather a relationship that takes into account the legislative policy of investigation and conciliation. Just recently, in *Bennett*, *supra*, Judge Mukasey set out the circumstances in which a claim of discrimination is properly before the court:

a) where a plaintiff presents it to the EEOC; or

b) where the EEOC investigates the claim; or

c) where the EEOC investigation of the original charge reasonably could be expected to encompass the claim.

Almendral v. New York State Office of Mental Health, 743 F.2d 963, 967 (2d Cir. 1984); *Smith v. American President Lines, Ltd.*, 571 F.2d 102, 107 n. 10 (2d Cir. 1978) (citing cases); *Grant v. Morgan Guaranty Trust Co. of N.Y.*, 548 F. Supp. 1189, 1191 (S.D.N.Y. 1982).

Here, the District Court properly found that the EEOC did not in fact investigate plaintiff's claim that the Housing Authority failed to plea bargain her disciplinary charges. Ironically, plaintiff's counsel also never "investigated" this purported retaliation claim while discovery was still open. It was not until late 1988 that plaintiff moved to reopen discovery to investigate this claim and sought to discover Housing Authority policies and records relating to disciplinary proceedings conducted between 1979 and 1984. JA 315, 318.

The District Court also properly found that the EEOC's investigation of plaintiff's original charges could not reasonably have been expected to encompass a further charge of retaliation based upon a failure to plea bargain. In *Almendral, supra*, the Second Circuit held that subsequent acts of discrimination are reasonably related when they " 'could reasonably [have been] expected to grow out of the [EEOC] charge of discrimination'." *Almendral* at 967. *See also Meyer*, 25 Fair Empl. Prac. Cas. (BNA) at 1005.

Plaintiff, whose June 1983, EEOC discrimination complaint dealt with discrimination based upon race, sex, religion and age, conceded that those were the sole charges brought before the EEOC and that the Housing Authority and co-defendants Arakel and Lefkowitz were the sole parties mentioned in that complaint. JA73. However, plaintiff's newly concocted retaliation claim concerns neither Lefkowitz nor Arakel nor indeed any other of her supervisors but only the Housing Authority's disciplinary attorney, Jerome Weisberger, Esq. *See Hall v. New York State Dep't of Environmental Conservation*, 726 F. Supp. 386, 388 (N.D.N.Y. 1989) (EEOC charge alleging denial of promotion because of racial discrimination was not reasonably related to retaliation claim of poor job evaluation because the claims involved different individuals.).

In addition, based upon the charge that plaintiff did file with the EEOC, one could not expect the EEOC to have investigated whether the state Civil Service due process hearing constituted "an act" of retaliation. Indeed, neither plaintiff nor the Housing Authority has found any case in which a failure to plea bargain was alleged to even constitute an act of retaliation. To the contrary, the failure to provide a due process hearing would more likely be the subject of a retaliation claim.

In a similar vein, in *Halpert v. Wertheim & Co.*, 81 F.R.D. 734 (S.D.N.Y. 1979), the court held that the retaliatory conduct complained of, namely, an attempt to arbitrate plaintiff's claim, was "not of the type that could reasonably be expected to grow out of the [sex] discrimination here alleged." *See also Meyer*, 25 Fair Empl. Prac. Cas. (BNA) at 1005 (The question is whether the discriminatory charge might "reasonably be expected to alert the agency to the separate and distinct charge of retaliation.").

In addition, here the Housing Authority was aggrieved by its inability to conciliate plaintiff's retaliation charge. First, all of plaintiff's other discrimination charges have been abandoned or dismissed. Second, it would be unreasonable to conclude that a public agency such as the Housing Authority would not have taken corrective action if it had been timely alerted to a meritorious claim of retaliation. Finally, the alleged act of retaliation occurred when corrective action was still possible: the disciplinary hearing had not yet begun, plaintiff still was in the employ of the Housing Authority and she had not yet suffered any penalty. Accordingly, requiring plaintiff to file her retaliation charge in a timely manner is not a superfluous procedural technicality. If she had timely filed that charge, she would have presented the Housing Authority with an opportunity, if warranted, for administrative conciliation while the alleged discrimination was still fresh. *See Bickley*, 527 F. Supp. at 179.

B. *Plaintiff's Assertion That Every Retaliation Claim Is Reasonably Related To The EEOC Charge And Therefore Need Not Be Filed With The EEOC Is Belied by Controlling Precedent.*

Plaintiff's assertion that it is "well settled" that an act in retaliation for the initiation of an EEOC complaint is reasonably related to the EEOC charge and therefore need never be filed with the EEOC is belied by the decisions of this Circuit. Also, it would be ill-advised for this Circuit to adopt such a policy for it would encourage the routine non-filing of retaliation charges with the EEOC and the inevitable introduction of such a charge in the course of subsequent federal litigation, especially where, as here, the discrimination charge filed with the EEOC has otherwise melted away. Further, such a policy contravenes the Congressional policy of investigation and conciliation of both Title VII and ADEA cases.

1. *The Decisions in the Second Circuit Do Not Support Plaintiff's Per Se Rule*

The decisions in this Circuit do not support plaintiff's *per se* rule. The most recent Second Circuit case dealing with retaliation for the filing of EEOC charges is *Stewart v. United States Immigration and Naturalization Service*, 762 F.2d 193, 197-98 (2d Cir. 1985). In *Stewart*, the plaintiff alleged that his suspension without pay was in retaliation for his race-and-national-origin discrimination charges before the EEOC. *Id.* at 195, 198. Judge Pierce discussed the facts and circumstances of the case and concluded that the district court lacked subject matter jurisdiction because plaintiff's suspension was not "reasonably related" to the earlier claims of discrimination. *Id.* at 198. Similarly, in *Meyers v. Amerada Hess Corp.*, 647 F. Supp. 62, 67 (S.D.N.Y. 1986), plaintiff claimed that defamatory statements made by the employer after plaintiff had filed an EEOC age discrimination charge were in retaliation for plaintiff's EEOC filing. Judge Weinfeld, however, held that the age discrimination claim and the retaliation claim involved "distinct factual realms".

Also, in *Cheung v. New York State Office of Mental Health*, 50 Fair Empl. Prac. Cas. (BNA) 868 (W.D.N.Y. 1989), the *pro se* plaintiff alleged suspension without pay in retaliation for filing a prior racial discrimination action. The court dismissed the retaliation claim and held that the two actions involved different causes of action and arose from separate sets of circumstances. Therefore, they were not "reasonably related" to those previously dealt with at the administrative level. *See Hall*, 726 F. Supp. at 388 (the court held that the EEOC charge was not reasonably related to the retaliation complaint because they involved different individuals). *See also Ibrahim v. New York State Dep't of Health*, 581 F. Supp. 228, 233 (E.D.N.Y. 1984) (McLaughlin, J.) ("administrative exhaustion of a retaliation claim is required notwithstanding the close relationship of that claim to an underlying claim of employment discrimination under [Title VII] as to which a plaintiff has exhausted his administrative remedies."); *Cosgrove, supra* (Plaintiff's sex discrimination charge did not put the whole working relationship with defendant at issue; therefore, plaintiff's retaliation claim in response to her pay raise request "is not factually or logically related" to the EEOC charge.).

2. *Plaintiff's Cases Do Not Demonstrate The Existence of a Per Se Rule*

Plaintiff erroneously relies upon *Goodman v. Heublein, Inc.*, 645 F.2d 127, 129, 131 (2d Cir. 1981) and *Kirkland v. Buffalo Bd. of Education*, 622 F.2d 1066, 1968 (2d Cir. 1980), for support of her contention that every retaliation charge is reasonably related to the original EEOC complaint. *Goodman*, however, merely reaffirms the general "reasonably related" rule applied in *Kirkland*.

In *Goodman*, the court apparently investigated the facts and found that the retaliation claim - plaintiff's transfer out of the country which thereby precipitated his discharge - was reasonably related to his EEOC charge that he had not been promoted to Vice-President by his employer, because of his age. There, however, the retaliation complained of consisted of an

order by the employer to the employee to transfer out of the country, which led to a dispositive act, the employee's discharge. Thus, it would not be usual - indeed, it is common - for the EEOC to investigate a discharge that followed an EEOC filing.

In the instant case, however, the circumstances are vastly different. Here, the retaliation claim does not involve a discharge but rather the Housing Authority's failure to plea bargain. The District Court examined the circumstances surrounding plaintiff's retaliation complaint and concluded that a failure to plea bargain, thereby merely precipitating a legally mandated Civil Service hearing was not reasonably related to plaintiff's EEOC discrimination charge based on sex, religion, race and age.

Plaintiff also relies on *Kirkland*. However, the retaliatory conduct in *Kirkland*, a refusal to hire, precisely mirrored the earlier EEOC discrimination charge of a prior refusal to hire. In *Kirkland*, the court emphasized that the claims were "directly related" to one another and that the plaintiff, therefore, need not have obtained a separate right-to-sue letter every time he alleged that he was wrongfully denied employment. *Id.* at 1068.

Excerpts from Catherine Owens' brief to the United States Court of Appeal for the Second Circuit

B. *The District Court Erred In Holding That The Adverse Action Taken By The Housing Authority In Response To The Filing Of Owens' Charges With The EEOC Was Not Reasonably Related To Owens, Original EEOC Complaint*

The District Court held that it did not have jurisdiction over Owens' retaliation claims because Owens had failed to include those claims in her EEOC complaint. This was an error.

ADEA provides that "[i]t shall be unlawful for an employer to discriminate against any of his employees . . . because such individual, member or applicant for membership has made a charge, testified, assisted or participated in any manner in an investigation, proceeding, or litigation under this chapter." 29 U.S.C. § 623(d) (West 1985). Title VII has a similar provision.

42 U.S.C. § 2003e-3(a) (West 1981). The retaliatory conduct at issue in this appeal concerns actions by the Housing Authority that occurred after Owens filed her complaint with the EEOC in June of 1983 and during the dependency of the EEOC investigation.[4]

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[4] In the first and second summary judgment motions Owens argued that two different types of actions by the Housing Authority fell within the proscriptions of the retaliation bars of ADEA and Title VII: 1) retaliation by the Housing Authority for protected actions which took place *prior* to the filing of her EEOC complaint; and 2) retaliation by the Housing Authority for protected actions which took place *after* the filing of her EEOC complaint. The factual predicates of Owens' age discrimination claims and first category of retaliation claims are identical. Asserting a retaliatory motive merely changes the theory of the claim, not the facts investigated by the EEOC. Since the retaliatory conduct that took place prior to the EEOC complaint are subsumed within Owens' primary claims of age discrimination, plaintiff-appellant's brief argues only with respect to the Court's error in finding lack of subject matter jurisdiction over the latter type of retaliation.